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1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 Case No. 05-44481 (RDD)

5 In the Matter of:

6 DPH HOLDINGS CORP., et al.

7 | **Debtors.**

9 Adversary No. 09-01510 (RDD)

10 In the Matter of:

11 ACE AMERICAN INSURANCE COMPANY, et al.,

12 v.

13 DELPHI CORPORATION, et al.,

15 Adversary No. 11-02934 (RDD)

16 In the Matter of:

17 CAI DISTRESSED DEBT OPPORTUNITY MASTER FUND LTD.

18 v.

19 DELPHI AUTOMOTIVE PLC, et al.,

United States Bankruptcy Court

22 One Bowling Green

23 New York, New York

24 | March 22, 2012

25 10:19 a.m.

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1 B E F O R E:
2 HON ROBERT D. DRAIN
3 U.S. BANKRUPTCY JUDGE
4 ECR OPERATOR: ELVIRA AGUIRRE-MORENO

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1 **Notice of Agenda Proposed Seventy-Fifth Omnibus Hearing**

2 **Agenda:**

3 **(1) Motion by Reorganized Debtors to Enforce Plan Injunction**

4 **Against Oldco Trustee;**

5 **(2) Motion by James Grai to Lift Stay;**

6 **(3) Letter Filed by Patricia Meyer;**

7 **(4) Motion by Michigan Defendants Regarding Lift Stay Order**

8 **(Ad #09-0150);**

9 **(5) Complaint by CAI Plaintiffs for Declaratory Relief (Ad**
10 **#11-2934)**

11

12 **Notice of Agenda Proposed Fifty-Third Claims Hearing Agenda**

13

14 **Adversary Proceeding: 09-01510-rdd ACE American Insurance**
15 **Company et al v. Delphi Corporation, et al. Motion by**
16 **Michigan Regarding Lift Stay motion**

17

18 **Adversary Proceeding: 11-02934-rdd CAI Distressed Debt**
19 **Opportunity Master Fund Ltd. v Delphi Automotive PLC et al**
20 **Pretrial Conference**

21

22

23

24

25 **Transcribed by: Sherri L. Breach, CERT*D-397**

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16

17 APPEARED TELEPHONICALLY:

18 FRANK LAROSA

19 ROBERT G. KAMENEC

20 SHAUN WONG

21 GEORGE BRICKFIELD

22

23

24

25

1 P R O C E E D I N G S

2 THE CLERK: All rise.

3 THE COURT: Please be seated.

4 Okay. Good morning. In re: DPH Holdings.

5 MR. CAMPANARIO: Good morning, Your Honor. Nick
6 Campanario of Skadden on behalf of the reorganized debtors
7 and we're here this morning for a claims hearing and an
8 omnibus hearing.

9 THE COURT: Right.

10 MR. CAMPANARIO: On the claims side, there's
11 nothing at all on the agenda and so there's nothing to be --
12 nothing to be done with regard to claims.

13 On the omnibus side there are five items on the
14 agenda and we're prepared to proceed through those now, Your
15 Honor.

16 THE COURT: Okay. That's fine.

17 MR. CAMPANARIO: The first item is the motion by
18 reorganized debtors to enforce plan injunction against Oldco
19 Trustee. That motion has been resolved and the reorganized
20 debtors have filed a withdrawal of the motion. That's at
21 Docket Number 21839. That's all I have unless Your Honor
22 has questions about that.

23 THE COURT: No. That's fine.

24 MR. CAMPANARIO: Okay.

25 The second item is the motion by James Grai to

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1 lift stay. As the Court is aware the parties are working
2 toward a stipulation that would resolve this motion.

3 At this point DPH and ACE have completed and
4 they've exchanged their analyses of the claimants that were
5 covered by the motion. There were some discrepancies
6 between the two analyses and we're working on reconciling
7 those at this point.

8 In connection with that we had some questions for
9 Michael Dowd who is the counsel for the claimants covered by
10 the motion. We reached out to him with those questions and
11 we're awaiting response on those.

12 THE COURT: Okay.

13 MR. CAMPANARIO: That's where we are on that.

14 THE COURT: Do the parties prefer doing this all -
15 - all at once as opposed to just going ahead with the ones
16 you agree with now and -- and saving the other ones for
17 later --

18 MR. CAMPANARIO: Umm --

19 THE COURT: -- or is it -- do you think there will
20 be a solution to this imminently?

21 MR. CAMPANARIO: I don't know if I would say
22 imminently. I think we would prefer to wrap it all up in
23 one stipulation. If -- if we complete the reconciliation
24 process and for some reason it looks like it's going to take
25 a long time to resolve some portion of them, it may make

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1 sense at that point to --

2 THE COURT: Yeah. No. I --

3 MR. CAMPANARIO: -- consider --

4 THE COURT: -- I think you should do that.

5 MR. CAMPANARIO: -- splitting them off.

6 THE COURT: I mean, there -- there are -- I mean,
7 they're real -- there are people waiting on -- on this
8 money. It's important to them. So I think if the
9 reconciliation issues are limited to a -- you know, a
10 minority of the -- of the group and it looks like it's going
11 to take, you know, a couple of more months to resolve those,
12 then I think you should move ahead with the stipulation on
13 the ones that everyone agrees on.

14 MR. CAMPANARIO: Understood, Your Honor.

15 THE COURT: Okay.

16 MR. CAMPANARIO: The third item is a letter and
17 other materials filed by Patricia Meyer on a pro se basis.
18 And I believe that Ms. Meyer may be in the courtroom today.
19 I'm not a hundred percent sure.

20 THE COURT: Okay. All right. I -- I scheduled
21 this matter. I don't know if -- is Ms. Meyer here or anyone
22 on her behalf?

23 MS. MEYER: Yes, sir.

24 THE COURT: All right. You should -- you should
25 come up, ma'am.

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2 THE COURT: I got a letter from you in January of
3 this year --

4 MS. MEYER: Yes, Your Honor.

5 THE COURT: I don't think it was served on anyone
6 in this case, but it was -- I had it filed on the docket.
7 And it appeared to assert claims either on your behalf or on
8 behalf of other parties. It wasn't clear to me whether
9 those claims were against Delphi or against GM. But it
10 asked for me to take action and I can't take action on an ex
11 parte basis. So I -- I -- I directed my chambers to contact
12 you and ask if you wanted me to issue some sort of ruling or
13 --

14 MS. MEYER: Yes, Your Honor.

15 THE COURT: -- consider some sort of relief, to
16 get a hearing scheduled, which I gather you did for today.

17 MS. MEYER: I did, Your Honor.

18 THE COURT: What is the relief you are seeking?

19 MS. MEYER: The relief would be for the entire
20 Delphi workers who -- or claim to be Delphi workers who
21 never worked for them. Our agency has laws. They were
22 advocate workers solutions.

23 THE COURT: I'm sorry. I can't -- I couldn't
24 hear.

25 MS. MEYER: I'm sorry. Our agency has laws. It's

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1 called Labor Advocate Workers Solutions. One of our members
2 of our board was retired from General Motors American Axle,
3 and in the past five years and up and before that time when
4 she received her pension from the PBGC, our agency started
5 working with the United States Government and the Federal
6 Bureau of Investigation.

7 So the relief would be the proof of what we know
8 about rulings in this situation with a worker who never
9 worked for Delphi and who is now in the PBGC. We've worked
10 with agencies for five consecutive years: the Federal
11 Bureau of Investigation, the Labor Department, the head of
12 the Internal Revenue. And the assumption was that we had
13 gone to another law firm to ask for their advice and in
14 asking that advice they said there was a ruling that they
15 thought the Court should be aware of in this case. It's
16 Rule 2008-45.

17 So if you ask what the compensation should be, it
18 should be that -- that the -- there was fraud perpetrated in
19 the case in this situation; that it was taken to all
20 agencies, federal agencies and we were advised to come to
21 give the information to you --

22 THE COURT: All right.

23 MS. MEYER: -- and I've done that today.

24 THE COURT: Okay. But -- well, all right.

25 MS. MEYER: Okay.

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1 THE COURT: Other than pointing out to me your
2 belief that there was a fraud perpetrated with the GM/Delphi
3 spin-off -- that's the fraud you're referring to, right?

4 MS. MEYER: We're referring to that and the
5 pensions of the Delphi workers. You have two classes of
6 Delphi workers. You have ones who were Delphi employees and
7 you have those who are not. And what happened in this case
8 was it was brought to our attention and those workers
9 actually went to the various law agencies and, at the advice
10 of attorneys in the Grand Rapids, Michigan area, they
11 suggested that we were able to prove that this was fraud and
12 to bring it to your attention --

13 THE COURT: But the --

14 MS. MEYER: -- for compensation.

15 THE COURT: The "this" you're referring to is the
16 spin-off and the assumption by Delphi of pension obligations
17 that you say were really obligations of GM?

18 MS. MEYER: Yes. That is correct, Your Honor.

19 THE COURT: Okay. I -- I don't see how that --
20 those would constitute claims against Delphi as opposed to
21 against GM.

22 MS. MEYER: If Delphi is in the PBGC, the
23 employees --

24 THE COURT: If Delphi is what?

25 MS. MEYER: If Delphi has to their pensioners

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1 (sic) put them in the public PBGC and these people were not
2 part of that, that frauds the PBGC and payment for people
3 who were never there. Delphi delegated it and if General
4 Motors was responsible, that's acceptable. But it still
5 lies in the hands of you, the judge, I would think owing
6 that you have been in the Delphi bankruptcy.

7 THE COURT: Well --

8 MS. MEYER: Yes or no, Your Honor?

9 THE COURT: -- the termination by Delphi of its
10 pension plans --

11 MS. MEYER: Yes, Your Honor.

12 THE COURT: -- the assumption of liability by the
13 PBGC was a -- was a matter that was noticed before this
14 Court on notice to the appropriate parties and was approved
15 by the Court, and that order is a final order. It's res
16 judicata and it's binding, and I don't believe there's any
17 basis to overturn that order.

18 MS. MEYER: If the -- if you live in the United
19 States and I came to you today honest on a claim that we
20 could prove that the PBGC has cases. We've dealt with them.
21 We've dealt with the Federal Bureau of Investigation. We've
22 dealt with several agencies and they explained to me that
23 they thought a letter should be sent to you about this.

24 THE COURT: Well, I -- I have -- I've received the
25 letter and I don't believe that there is a --

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1 MS. MEYER: Did you read the docketing of the --

2 THE COURT: Yes. Yes, ma'am.

3 MS. MEYER: Okay.

4 THE COURT: I did.

5 MS. MEYER: Okay.

6 THE COURT: And I note that the letter notes that
7 you and your group were aware of potential claims arising
8 from the GM/Delphi spin-off at least with the publishing in
9 1998 of the Delphi prospectus.

10 MS. MEYER: Yes, Your Honor.

11 THE COURT: And, (a) I don't believe that you're
12 asserting claims against Delphi as opposed to claims against
13 GM, which I think, at least based upon one of the pleadings
14 attached to your letter or subsequently filed, has been the
15 subject of litigation in the Delphi -- in the GM case,
16 right? You filed a claim in the GM case and it was objected
17 to?

18 MS. MEYER: It was objected to because it was
19 Delphi.

20 THE COURT: Right. Well -- anyway, that's been
21 dealt with in the GM case. I don't believe you filed a
22 claim in Delphi's case, right?

23 MS. MEYER: I just sent you the letter and the
24 information --

25 THE COURT: All right.

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1 MS. MEYER: -- docketing what we had.

2 THE COURT: Delphi established a bar date in its
3 case, early on in the case, on appropriate notice to those
4 that it knew were creditors and publication notice to those
5 that didn't know were creditors. In addition to that, under
6 the confirmation order, which was entered more than three
7 years ago, Delphi got a discharge. And I -- I believe that
8 any claims against Delphi at this point are -- are barred by
9 the bar date order and the discharge.

10 MS. MEYER: Then, Your Honor --

11 THE COURT: And I don't -- I actually don't really
12 see that there is a claim against Delphi, in any event,
13 given that the spin-off was a spin-off by GM. To the extent
14 that there was any claim that Delphi might have against GM
15 in respect to that spin-off, that was dealt with under the
16 plan. GM got releases under the plan, on wide notice. The
17 plan was confirmed. And, as I said before, the order
18 approving the termination of the pension plan as well as the
19 retiree benefits, that order is a final order now. It's --
20 it's not subject to appeal. And --

21 MS. MEYER: Okay, Your Honor. Then maybe you
22 could advise me, because we've worked with the federal
23 agencies and et cetera, and they suggested that I write the
24 letter. Then are you saying that if -- if we find -- who do
25 we go to? You have a final order, but --

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1 THE COURT: I -- I don't --

2 MS. MEYER: -- if the PBGC --

3 THE COURT: I don't know.

4 MS. MEYER: -- doesn't take it --

5 THE COURT: I don't -- I don't know.

6 MS. MEYER: You don't know?

7 THE COURT: I don't know who you go to. I could
8 tell you that having come to me on this point, I conclude
9 that there's no viable remaining claim at this point given
10 all of the orders that have been issued in this case.

11 MS. MEYER: All right.

12 THE COURT: -- on notice to parties.

13 MS. MEYER: Thank you very much, Your Honor.

14 THE COURT: Okay.

15 MS. MEYER: But you do not know where I go, then,
16 right, with this?

17 THE COURT: I don't.

18 MS. MEYER: Okay. Thank you very much.

19 THE COURT: Okay.

20 I think Counsel for DPH should prepare an order
21 consistent with that ruling.

22 MR. CAMPANARIO: Yes, Your Honor.

23 THE COURT: Okay. And -- and submit it to
24 chambers.

25 All right.

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1 MR. CAMPANARIO: May I address the Court from
2 counsel table, Your Honor?

3 THE COURT: Wherever you're comfortable.

4 MR. CAMPANARIO: The fourth item is the motion by
5 the Michigan defendants with respect to this Court's stay
6 order, and Michigan defendants' counsel is present in the
7 courtroom.

8 THE COURT: Okay.

9 MR. RATERINK: Good morning, Your Honor.

10 THE COURT: Good morning.

11 MR. RATERINK: Dennis Raterink appearing on behalf
12 of the Michigan Funds Administration. I'm here, as usual,
13 with my colleague, Susan Przekop-Shaw --

14 THE COURT: Good morning.

15 MR. RATERINK: -- representing the Michigan
16 Workers' Compensation Agency. As always we are referring to
17 our two clients as the joint Michigan defendants, as we
18 share similar positions in regards to this matter.

19 THE COURT: Okay.

20 MR. RATERINK: Your Honor, we are here today in
21 regards -- well, I -- I think I want to lay out at the
22 beginning what we are here for and then what we're not here
23 for in terms of our position.

24 We are here for discussion regarding our motion
25 that we have filed with the Court to partially lift the stay

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1 order that this Court had entered pending the appeal of the
2 Court's order which had denied Michigan's motion to dismiss
3 the adversary proceeding.

4 Those decisions have been appealed to, first, the
5 U.S. District Court and to the Second Circuit Court of
6 Appeal. On November 29th, 2011 the Second Circuit did issue
7 a decision which affirmed Your Honor's overall decision, but
8 made several pointed comments regarding a portion of this
9 case, specifically the Form 400 liability issue that has
10 been discussed throughout the litigation of this case. We
11 would like to discuss the implications of those comments as
12 it pertains to the stay order going forward.

13 What we're not here for today specifically, we're
14 not here to rehash old events. One of the parties had
15 indicated that - correctly, that the parties had expended
16 considerable time and resources coming here before you
17 originally to argue those issues and we don't intend to go
18 back and rehash those issues.

19 What we do want to do is -- is have the
20 opportunity to discuss the new developments that have arisen
21 in regards to the Second Circuit's order.

22 THE COURT: Well, I don't view them as new. The
23 first hour that I spent on this case in oral argument was to
24 ask you and your colleague whether there could be a suitable
25 agreement that the so-called Form 400 issue, divorced from

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1 any issue with respect to the insurance policies, could be
2 reached, because I would issue an order or "so order" such
3 an agreement that that issue could go forward without any
4 violation of the plan injunction.

5 MR. RATERINK: Correct.

6 THE COURT: And it's reported to me, and I think
7 without dispute, that DPH and the insurer plaintiffs were
8 prepared to reach such an agreement, but Michigan wasn't.
9 And it seemed to me, at least from the oral argument on this
10 point, that that was a fair representation.

11 I mean, if you're prepared to enter into that
12 agreement at this point so that it's crystal clear to the
13 Michigan court or the Michigan administrative body what --
14 what is before it and nothing else, this is a non-issue. It
15 always has been.

16 MR. RATERINK: With due respect, Your Honor, I
17 think you're -- you're correct that there was extensive
18 discussion on the record back and forth regarding the
19 potential to stipulate and try to settle that issue to see -
20 -

21 THE COURT: Right.

22 MR. RATERINK: -- if we could agree to send it back
23 to Michigan. And there were limitations that -- that we had
24 in representing our state client in terms of how far we
25 could stipulate, what we were allowed to stipulate for,

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1 whether we could stipulate as to issues of law, those kind
2 of things as you will recall.

3 And the bigger issue that we have at this point
4 now, after discussing with the appellate counsel that we've
5 added to our team and talking with the solicitor general for
6 the State of Michigan is, you know, one of the primary
7 issues that's been litigated in this going forward is
8 whether the Court's extension of its jurisdiction over these
9 matters impinges on Michigan's sovereign immunity. And at
10 this point to go forward with the stipulation pertaining to
11 the Form 400 issue in limiting the, Michigan's abilities in
12 any ways regarding going back would be an admission that
13 this Court has jurisdiction over that issue to begin with.

14 THE COURT: Well, then, we should go through the
15 appeal. I mean, it's --

16 MR. RATERINK: And --

17 THE COURT: -- one or the other.

18 MR. RATERINK: -- and we are.

19 THE COURT: All right. Then the stay should stay
20 in place.

21 MR. RATERINK: And we -- we have been. And -- and
22 I'll explain why I think the opportunity has presented
23 itself to come back to you at this point.

24 THE COURT: Okay.

25 MR. RATERINK: You know, out of respect to Your

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1 Honor to some degree because we think that there has been a
2 change of circumstances. If you disagree, then -- then I'm
3 sure the order you'll issue will reflect that.

4 THE COURT: All right.

5 MR. RATERINK: But we wanted to come back and talk
6 to you and have a discussion about these issues and the
7 implications of what the court specifically said.

8 It's important, we think, that the Second Circuit
9 has set some boundaries about what this case -- what is
10 properly before that Court and, by implication, this Court
11 and what is not before that -- that Court and -- and, again,
12 by implication this Court.

13 Before we get to the exact -- what -- exactly the
14 court said I think it's important to give just a small
15 amount of context because a lot of what happened occurred
16 after you were -- we were before you, Your Honor.

17 THE COURT: Can I -- can I just interrupt you?

18 MR. RATERINK: Certainly.

19 THE COURT: I -- I've read the Second Circuit's
20 summary ruling carefully, as well as re-read my ruling and
21 Judge Marrero's ruling, and it appears to me that it's --
22 it's crystal clear that the Second Circuit has made it clear
23 that all issues pertaining to the insurance policies and
24 their effect are issues pursuant to which the bankruptcy
25 court has jurisdiction and pursuant to which Michigan has

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1 waived sovereign immunity. It's addressed very clearly.

2 Because Michigan is not prepared to limit the 401
3 issue or the 4 -- I'm sorry -- the Form 400 issue to an
4 issue that does not involve the policy, I think that the
5 issue that you're raising here, including in the context of
6 the Second Circuit's summary ruling is a red herring. If it
7 were solely limited to that issue, then from the start of
8 this case it's been clear that that issue, the 400 issue,
9 could be decided. But it's not, and you've just told me it
10 wouldn't be because you don't want to waive sovereign
11 immunity on -- on the related issue.

12 And, accordingly, I need to decide the issue of
13 the policy. And I believe that if Michigan were to go
14 forward and determine what it has termed to be the 400
15 issue, I believe what it -- as it construes that issue, that
16 includes issues with respect to the policies and, therefore,
17 it would be violating the plan injunction.

18 So not being prepared to limit the issue to simply
19 the real Form 400 issue, which is separate and apart from
20 the policy, it appears to me that I need to decide, first,
21 the policy issue. Once the policy issue is decided, you can
22 go and decide the Form 400 issue. The Form 400 issue, as
23 the Second Circuit said and as the complaint makes clear, is
24 not in front of me, the pure Form 400 issue. It's not part
25 of the adversary proceeding. It's just the policy.

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1 So once I decide that, there will be a pure Form
2 400 issue and you can decide that separately. I don't think
3 that there would be res judicata or collateral estoppel
4 because it wouldn't cover that issue, except to the extent
5 that it is determined that there is a defense to the Form
6 400 theory which is that it pertains to -- it must be
7 limited to whether there is a policy or not. That would be
8 collateral estoppel and res judicata because I would have
9 decided that.

10 MR. RATERINK: Understood. I think the main
11 distinction we would take with Your Honor -- Your Honor's
12 analysis is that the -- the implication of the Court's
13 ruling. You -- you've used the term --

14 THE COURT: The Second Circuit's ruling.

15 MR. RATERINK: Yes. The Second Circuit's ruling.

16 THE COURT: Okay.

17 MR. RATERINK: I'm sorry.

18 THE COURT: All right.

19 MR. RATERINK: You've used the terms a couple of
20 times, the "pure" 400 issue, and I understand what you mean
21 by that. But the -- that's not a term that the Second
22 Circuit used. The Second Circuit spoke in terms of the Form
23 400 issue. I mean, there can be no doubt, and we can -- we
24 can document the record, the pleadings and -- and Your
25 Honor's previous orders make it clear that -- that Your

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1 Honor felt that you had jurisdiction over the Form 400 issue
2 for the reasons that have been stated previously.

3 THE COURT: I'm not -- no. It -- to the contrary.
4 I didn't -- no. Only to the extent that it implicates the
5 policies.

6 MR. RATERINK: That -- that's what I mean. You
7 had indicated --

8 THE COURT: Right.

9 MR. RATERINK: -- that you thought it was
10 intertwined and couldn't be separated.

11 THE COURT: Right.

12 MR. RATERINK: So to that extent you thought that
13 you had jurisdiction over those issues.

14 THE COURT: Not -- not over -- again, only to the
15 extent that the policy is implicated; otherwise I don't, and
16 I -- I -- that's why I said you all should -- if you really
17 believe it's a separate issue, I'll "so order" a stipulation
18 and it will be clear to the Michigan Court. It will be
19 clear to the parties and we'll -- you know, you can go
20 forward on that basis.

21 MR. RATERINK: And -- and we talked about the
22 stipulation and those --

23 THE COURT: Right.

24 MR. RATERINK: -- same difficulties that we had
25 previously still remain here.

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1 THE COURT: All right. Well --

2 MR. RATERINK: We can't stipulate for parties that
3 are not before the Court.

4 THE COURT: Okay.

5 MR. RATERINK: We can't control other people and
6 other individuals.

7 THE COURT: Well, let me -- let me interrupt.

8 Maybe --

9 MR. RATERINK: Sure.

10 THE COURT: Maybe -- maybe this is an issue that -
11 where there have been discussions between the parties and
12 I'm just -- I'm not aware of those or I'm missing something.

13 Separate and apart -- this is really a question
14 for ACE. Separate and apart from whether there is a policy
15 that covers these claims and/or whether it should be
16 reformed, is ACE asking me to decide just on a pure
17 regulatory basis that the filing or non-filing of a Form 400
18 doesn't create liability?

19 MR. OLSHIN: Your Honor, Lou Olshin. We've not
20 asked you to look at the question that you attempted for
21 eighteen months to separate out from the case.

22 THE COURT: Okay.

23 MR. OLSHIN: And there's been, at least by my
24 count, six opportunities through the various appeals and
25 proceedings and today for Michigan to say, yes, we consent

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1 to the entry of ACE's motion for summary judgment which
2 finds that there's no liability under the policies. They've
3 refused to do that and I think we've spent numerous hours
4 and a lot of the Court's time trying to unravel, and now it
5 sounds like we have an appeal that -- or a cert petition to
6 the United States Supreme Court. Obviously, our concern is
7 that it's clear from the prior records before Your Honor,
8 the District Court and the Second Circuit --

9 THE COURT: Well, I -- I'm sorry. I didn't -- I'm
10 going to interrupt you. I was just really trying to --

11 MR. OLSHIN: Okay.

12 THE COURT: -- focus on this one question.

13 So -- so, for example, except for the ruling
14 you're seeking from me that there is no ACE policy that
15 covers these claims --

16 MR. OLSHIN: Right.

17 THE COURT: -- or that if -- that there's -- there
18 should be a reformation of the policy --

19 MR. OLSHIN: To conform to the parties' intent.

20 THE COURT: -- to conform to the parties' intent,
21 you are not seeking a ruling interpreting Form 400.

22 MR. OLSHIN: Correct.

23 THE COURT: Okay. So --

24 MR. OLSHIN: But --

25 THE COURT: -- it's not even in front of me,

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1 consistent with what the Second Circuit said, and, I think,
2 consistent with what Judge Marrero said and what I said.

3 MR. OLSHIN: But the issues on the merits before
4 this case became intertwined because Michigan refused to
5 stipulate --

6 THE COURT: Right. No --

7 MR. OLSHIN: -- to that concept.

8 THE COURT: -- I -- yeah.

9 MR. OLSHIN: And I think we spent a lot of time on
10 the record running through that --

11 THE COURT: Okay.

12 MR. OLSHIN: -- issue as DPH Holdings pointed out
13 in their papers.

14 THE COURT: Now one other thing you said, and I --
15 I should have asked you -- I should have asked counsel for
16 Michigan this question. Has -- has a petition for cert
17 already been filed?

18 MR. RATERINK: It has not been yet.

19 THE COURT: It has not, okay, because it's not
20 until April --

21 MR. RATERINK: 8th or --

22 THE COURT: -- 10th or 11th or something --

23 MR. RATERINK: Correct.

24 THE COURT: -- that's your deadline. Okay.

25 MR. RATERINK: Correct.

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1 THE COURT: Well, I mean, if -- if I'm not -- if
2 I'm not going to be asked to decide the Form 400 point
3 separate and apart from whether there's a policy in place, I
4 think the issue of whether there's jurisdiction or sovereign
5 immunity is moot and that's -- that's why the Second Circuit
6 didn't deal with it, I didn't deal with it and Judge Marrero
7 didn't deal with it.

8 MR. RATERINK: Well, I -- I think that there's a -
9 - a distinction, Your Honor -- a difference of opinion here
10 because you read the second report -- the Second Circuit's
11 opinion to say the Court is saying that the issue of the
12 Form 400 is not before it, the pure 400 issue. But, again,
13 I would reiterate the court never says anything to that
14 extent. It doesn't even say --

15 THE COURT: But it --

16 MR. RATERINK: -- that the issue regarding the
17 interrelation -- it just says the Form 400 --

18 THE COURT: All right.

19 MR. RATERINK: -- issue is not before it.

20 THE COURT: But -- but it -- but it very clearly
21 says that all issues pertaining to the existence or
22 interpretation of the insurance policies are front and
23 center and, you know, that's what its opinion says in -- in,
24 you know, a pretty thorough way for a summary opinion.
25 There's -- there's core jurisdiction with a waiver of

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1 sovereign immunity.

2 So to the extent that Michigan is saying that the
3 Form 400 issue includes issues with respect to whether and -
4 - and where there is a policy that covers these claims and
5 what that policy says is part of the Form 400 issue, then it
6 -- I -- it's pretty clear to me from the Second Circuit's
7 opinion that that's something I have jurisdiction over; and
8 that's what the complaint is seeking.

9 What they say is the complaint isn't seeking
10 relief on -- on the 400 issue, and since I -- it's pretty
11 clear what the complaint is seeking relief on, I have to
12 assume it isn't the so-called -- what I'm calling the pure
13 Form 400 issue because it's seeking a -- the complaint is
14 seeking relief on a declaration as to the policy. And --
15 and they've clearly ruled on that.

16 MR. RATERINK: Well -- and --

17 THE COURT: And so I think there's only one in --
18 one possible interpretation of what -- what they're saying.

19 MR. RATERINK: And you're -- and you're referring
20 to the pure 400 issue?

21 THE COURT: Right.

22 MR. RATERINK: And, again -- and for the record we
23 -- we would argue that the Court's opinion can be
24 interpreted differently and --

25 THE COURT: Okay.

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1 MR. RATERINK: -- can be interpreted to say that --
2 that there can be no question of the fact that the Michigan
3 defendants from the get-go have argued that this Court
4 doesn't have jurisdiction over the litigation of the Form
5 400 issues in any manner, even with the interplay issue, and
6 have continued to advance that argument at every stage of
7 the process.

8 So, then, for the Second Circuit to come back in
9 its opinion and indicate that there is no 400 base claim in
10 the complaint, that was absolutely correct. The complaint
11 was not sounded in -- in terms of the Form 400. But Your
12 Honor himself indicated on Page 6 of his -- of your order
13 denying the motion to dismiss that the insurers were seeking
14 the declaration that the insurers are not liable under
15 either theory espoused by the agency.

16 So, clearly, the issue was before --

17 THE COURT: But you --

18 MR. RATERINK: -- the Second Circuit.

19 THE COURT: But I -- then I -- then I spent like a
20 whole page explaining why the State of Michigan, frankly,
21 was talking through its hat, as I spent two hours, and the
22 parties spent probably countless hours, nailing down. I
23 mean, it's just not -- it's not credible. I'm sorry. I
24 spent too much time on this. It is -- and it's -- it's --
25 it's clear to me. And we've spent, you know, fifty minutes

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1 on it today. The State is still not prepared to limit the
2 issue to simply the issue of, is the insurers' liability
3 driven by the form, and it's because they want to say that -
4 - or they're worried about the insurers' defense that --
5 that that incorporates the policy, and if there's no policy,
6 the form doesn't apply.

7 So I don't know how, you know, I could -- any --
8 any of the three courts could be any clearer on this issue.
9 And I'm not just not prepared to lift the stay, particularly
10 knowing, and I appreciate the candor, that -- that Michigan
11 would, in essence, argue the policy issue in front of the
12 Michigan court.

13 MR. RATERINK: Well, and just to make clear on
14 that, Your Honor, there -- there were discussions regarding
15 that interplay about if a contract was raised on -- as a
16 defense --

17 THE COURT: Right.

18 MR. RATERINK: -- to the Form 400 issue. I think
19 we've made statements in the pleadings that -- that are
20 accurate. We don't think the Form 400 really is base -- is
21 reliant on the contracts. We are --

22 THE COURT: Well, I mean --

23 MR. RATERINK: -- regarding that.

24 THE COURT: -- you could stipulate to that and
25 I'll -- I'll lift the stay, as I was prepared to lift it

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1 eighteen months ago and the people of -- you know, the
2 claimants can maybe get some money on that basis, you know,
3 if the Michigan State Court agrees with that. But I don't
4 think that's going to happen. I mean, I don't think that's
5 how -- if I just simply lift the stay, it won't -- that
6 won't happen, that -- that narrow determination won't
7 happen. So it needs to be in writing, signed by Michigan,
8 and I -- and Michigan is not willing to do it. And I -- I
9 appreciate why it's not willing to do it. It doesn't want
10 to waive this contract issue.

11 MR. RATERINK: Well, Your Honor had also evidenced
12 some concerns at the original hearing that even if Michigan
13 was able to stipulate to the extent to say that the
14 insurance contracts were not germane to the issue of the
15 Form 400, that the magistrates themselves, the other parties
16 who are not here today, the plaintiffs and any potential co-
17 defendants, would not be bound by that stipulation.

18 THE COURT: But they would be -- they would be
19 bound by the stay. I would basically say the stay is -- is
20 lifted for this issue.

21 MR. RATERINK: You would -- you would say the stay
22 would be lifted -- partially lifted to allow the pure 400 --

23 THE COURT: Right.

24 MR. RATERINK: -- issue to go forward.

25 THE COURT: Similarly to the plan injunction would

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1 have been lifted. You know, that was the whole premise of
2 the --

3 MR. RATERINK: Right.

4 THE COURT: -- and -- and you can certainly say in
5 a stipulation that, to the extent that -- that no one is --
6 is entitled to argue that to the extent this might
7 constitute a waiver of sovereign immunity that it applies to
8 any other issue in the case or any other issue ever raised
9 by Michigan as far as sovereign immunity is concerned.

10 MR. RATERINK: Understood. And we may be able to
11 engage in further discussions along those lines, not
12 detracting from the fact that we do think the Second Circuit
13 has provided clear guidance in -- in a different manner that
14 the --

15 THE COURT: Okay.

16 MR. RATERINK: -- judge interprets what they have
17 said in this case.

18 They had every -- they had every ability to come
19 back and say we think to the extent that the Form 400s
20 implicates these insurance contracts, that this Court does
21 have jurisdiction and sovereign immunity is not implicated.
22 They didn't say that.

23 THE COURT: It --

24 MR. RATERINK: They just said the Form 400 --

25 THE COURT: It wasn't in front of them.

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1 MR. RATERINK: -- issue was not before it.

2 THE COURT: -- the complaint doesn't --

3 MR. RATERINK: Right.

4 THE COURT: -- it's -- they -- they shouldn't --

5 there's no reason why they would rule on something where the
6 complaint's -- doesn't cover that issue.

7 MR. RATERINK: But the complaint wasn't the only
8 issue. As your Court -- as Your Honor recognized, the issue
9 in the -- in the ongoing litigation of the case, the Form
10 400 issue was not raised until the defendants came to the
11 State of Michigan. The Michigan defendants came in and
12 said, wait, Your Honor, there's a further jurisdictional
13 issue here. So as -- as things got litigated further on
14 down the line, then the plaintiffs -- ACE in this case --
15 said, well, yeah, we want a ruling as to both, both on the
16 contracts and the Form 400. That's the both theories of
17 liability that's --

18 THE COURT: But their --

19 MR. RATERINK: -- stated in your contract.

20 THE COURT: -- their counsel has just stated --
21 stated to the contrary.

22 MR. RATERINK: I'm sorry.

23 THE COURT: They want a ruling only as far as
24 their defense about there being a policy. They're not --
25 they're not -- they are not seeking a ruling from me that,

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1 on its own, their form, if they -- if they don't have a
2 policy that covers this, would or would not make them
3 liable. They're not seeking that ruling in front of me.

4 So, therefore, my -- my ruling either way on -- on
5 the complaint wouldn't be res judicata or collateral
6 estoppel on that narrow issue. It would be as far as, you
7 know, if the parties then try to incorporate the policy
8 terms into the form in some way, then it would be res
9 judicata, but -- or collateral estoppel. But, again, that
10 separates out the two issues.

11 MR. RATERINK: Understood.

12 THE COURT: So I -- I mean, I -- I just -- I --
13 I'm going to deny this motion, then.

14 MR. RATERINK: Can I --

15 MS. PRZEKOP-SHAW: Your --

16 MR. RATERINK: -- take a moment to confer --

17 THE COURT: Sure.

18 MR. RATERINK: Thank you.

19 (Pause)

20 MS. PRZEKOP-SHAW: Your Honor, Susan Przekop-Shaw
21 on behalf of the Michigan Workers' Compensation Agency. How
22 are you? Good.

23 What I wanted to cover before -- I know I heard
24 you just say that you deny it, but I would like to have the
25 opportunity on the agency's behalf to place some information

1 on the record.

2 THE COURT: Okay. That's fine. I thought you --
3 your co-counsel was speaking for both of you, but that's
4 fine. You can go ahead.

5 MS. PRZEKOP-SHAW: Thank you very much.

6 The Court just said that -- that ACE wanted to
7 find out whether they are liable under the insurance
8 contracts or policies for purposes of workers' compensation
9 benefits. I think the question is whether -- whether ACE,
10 under those contracts -- let me switch it. The question --
11 if the question is further narrowed in this manner whether
12 Delphi has any obligations to pay workers' compensation
13 benefits under the policies, that's distinctively different
14 than saying ACE has no liability under the insurance
15 policies because the issue before Michigan is not
16 contractual in nature, as the court acknowledged in the
17 Second Circuit. It's a situation of ACE's liability apart
18 from the contractual theory.

19 So if the Court would consider drafting it so that
20 it's a stipulation that under these policies Delphi has no
21 obligation to pay for any workers' compensation benefits in
22 Michigan under the policies, that's more accurate.

23 And in regards to that, and similarly, the problem
24 that we're running into here is ACE continues to call them
25 the self-insured workers' compensation obligations. That's

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1 not what it is. It's not self-insured workers' compensation
2 benefits that are pending in Michigan right now. It's
3 workers' compensation obligations, period. Delphi is -- was
4 responsible for the self-insured workers' compensation
5 benefits that they -- because they were self-insured status
6 in Michigan were required to pay. And in that case Delphi
7 was paying each one of the benefits.

8 Once this plan was entered and the injunction was
9 entered, Delphi -- the self-insured workers' compensation
10 benefits in the sense solely towards this contract no longer
11 existed. There may be some post-petition claims and other
12 claims that are pending that are within the -- Delphi's
13 responsibility. But in regards to this issue on the
14 contract policy, if you flip it and reflect -- and that's
15 what's the Court's job. It's not what ACE's liability is.
16 It's what DPH Holding is obligated to pay.

17 And if -- if the Court considers that type of
18 interpretation, that that's where this is going, I think
19 that would be more attuned to what we're saying here because
20 in Michigan there -- we -- we do maintain that the Form 400
21 base claim is not based on any contract because that self-
22 insured contract -- insurance policy no longer exists. It's
23 -- it's not -- it's not available for the Michigan employees
24 who have claims -- excuse me -- the Delphi employees who
25 have claims before the administrative law judge.

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1 THE COURT: But why does it no longer exist?

2 MS. PRZEKOP-SHAW: Because the plan objection --
3 the plan injunction, you released Delphi from paying any
4 more self-insured obligations. And if the plan, as they
5 maintain, is based upon self-insurance --

6 THE COURT: But -- but --

7 MS. PRZEKOP-SHAW: -- there's no issue.

8 THE COURT: -- but let me -- but, again, this is --
9 this goes back to the stipulation we -- we started the whole
10 case with. And the Second Circuit was very clear on this.
11 They cited the same cases I cited, including PSI Net. If,
12 in fact, the insurers' liability under Form 400 depends upon
13 whether or not there is a policy, they will have a claim
14 depending on one outcome or they will not have a claim
15 depending on the other outcome of that issue in this
16 bankruptcy case.

17 And so, therefore, it's front and center for me.

18 On the other hand, if the issue is clearly
19 delineated for the Michigan Court that the existence of a
20 policy is completely out of the picture as far as the Form
21 400 liability, then I -- I agree with you. But that's not -
22 - I don't think that's the case, because the parties haven't
23 been able to limit it in that way.

24 So I -- it comes right back to the analysis that
25 appears at -- at Page 6 of the -- of the Second Circuit's

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1 opinion, and in both Judge Marrero's and in my opinion.

2 MS. PRZEKOP-SHAW: But in -- when you take it into
3 that position then you are infringing or -- or basically by
4 taking the position that you said instead of what I was
5 initially proposing, then what's happening is that you are
6 imparting the bankruptcy court's authority over what can and
7 can't be said in that --

8 THE COURT: Well --

9 MS. PRZEKOP-SHAW: -- in --

10 THE COURT: -- I -- you know, I think at this
11 point that's an argument you need to be making to the
12 Supreme Court.

13 MS. PRZEKOP-SHAW: Okay. Fair enough.

14 One other point I wanted to say, and I would
15 really like this corrected. The Michigan defendants are the
16 funds administration and the workers' compensation agency.
17 We don't speak on behalf of the State of Michigan. And one
18 of the points that kept --

19 THE COURT: I'm just using --

20 MS. PRZEKOP-SHAW: -- that kept coming --

21 THE COURT: I'm just using shorthand when I say
22 Michigan.

23 MS. PRZEKOP-SHAW: Okay, because I -- there is a
24 major distinction because you even used the term state.
25 But, remember, it's the agency and the funds administration.

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1 THE COURT: Right.

2 MS. PRZEKOP-SHAW: We're not here speaking on
3 behalf of Mr. Dowd and on behalf of the plaintiffs that are
4 there.

5 THE COURT: No. I understand..

6 MS. PRZEKOP-SHAW: If this Court ended up making
7 its decision, separating out the two entities, making its
8 decision I would anticipate it would be earlier than later.
9 But if this Court made its decision as to the insurance
10 policy and -- and permitted it to be going back, you know,
11 that -- that's a situation where -- and something happens,
12 we've maintained that the agency and the funds
13 administration continue to state that contracts are not part
14 of this Form 400 matter.

15 And in regards to that -- in that -- in that
16 indication, others like Mr. Dowd or other entities may start
17 turning to the insurance policies again. We can't control
18 that necessarily. We can't control that. That's part of
19 it. And -- and the Court saying that it needs to control
20 that, it needs to control that because of the policy is
21 where we feel that the sovereign immunity arises. And --
22 and, obviously, that's an issue that we can take to the --
23 to the Court --

24 THE COURT: Okay.

25 MS. PRZEKOP-SHAW: -- to proceed on with it.

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1 Anything else?

2 MR. RATERINK: No.

3 MS. PRZEKOP-SHAW: Thank you for your time.

4 THE COURT: All right. Thank you.

5 MS. PRZEKOP-SHAW: I guess you're going to make a
6 ruling right now, right?

7 THE COURT: Well, unless I -- unless the other
8 parties have something to say?

9 MR. OLSHIN: I think we've covered it, Your Honor.

10 THE COURT: Okay. All right.

11 I have a motion before me by the State of Michigan
12 Workers' Compensation Insurance Agency and the State of
13 Michigan Funds Administration, two of the three defendants
14 in this declaratory judgment action brought by ACE American
15 Insurance Company and Pacific Employers Insurance Company.
16 I'll refer to them as the Michigan agencies, although one of
17 them is an administration instead of an agency, for ease of
18 reference.

19 The Michigan agencies seek a modification of an
20 order entered by this Court in late January, January 28th,
21 2010 granting a stay in this adversary proceeding pending
22 the Michigan agencies' interlocutory appeal of my order from
23 earlier that month denying the Michigan agencies' motion to
24 dismiss or abstain in the adversary proceeding.

25 The stay pending appeal was, obviously, for the

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1 benefit of the Michigan agencies so that the proceeding
2 wouldn't go forward in accordance with my ruling pending the
3 appeal. But to protect the plaintiffs, as well as the co-
4 defendant, DPH Holdings, I imposed conditions on the stay
5 which did not include a bond, but did condition the stay on
6 the agencies continuing their standing down on their
7 proceeding with actions in Michigan pertaining to the issues
8 that were on appeal. They are specifically set forth in
9 subparagraphs (a) through (c) in the January 28 order.

10 The motion is premised upon language in the Second
11 Circuit's summary order affirming the District Court, Judge
12 Marrero, which in turn affirmed my ruling from January 2010,
13 in which, generally speaking, the Second Circuit stated that
14 this Court does, in fact, have core subject matter
15 jurisdiction over this adversary proceeding and that the
16 Michigan agencies are deemed to have waived sovereign
17 immunity under the U.S. Constitution Article I, Section 8,
18 Clause 2 as interpreted by, among other authorities, *Central
19 Virginia Community College v. Katz*, 546 U.S. 356-77 (2006).

20 The basis for the present motion is language that
21 appears in two places in the Second Circuit's summary
22 ruling. First, the Second Circuit said:

23 "The Michigan defendants argue that the adversary
24 proceeding is only nominally about the insurance contracts
25 and is actually about whether the insurers are liable under

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1 Michigan law for filing Form 400 notices of coverage. We
2 disagree.

3 "As the District Court and the bankruptcy court
4 concluded, the disputed issue in the adversary proceeding is
5 one sounding in contract. The adversary complaint makes
6 clear that the proceeding is focused on the parties'
7 responsibilities under the contract. There is no Form 400
8 base claim in the insurers' adversary complaint.

9 "Although the Michigan defendants may ultimately
10 prevail on the merits on their Form 400 theory, that
11 argument ultimately bears on the merits of whether the
12 insurers are liable apart from their contractual
13 obligations, which is not the question before us on
14 collateral review of the district court's denial of the
15 motion to dismiss the adversary complaint."

16 And then in paragraph -- I'm sorry -- in Footnote
17 2 to the ruling the Court states:

18 "This decision is limited to the matters before
19 us. We express no view and render no decision as to whether
20 the bankruptcy court has jurisdiction over any claim or
21 challenge to the liability of the insurers for filing the
22 Form 400 notices. Likewise, we express no view and render
23 no decision as to whether resolution of any claim brought in
24 federal court against the Michigan defendants would invade
25 their sovereign immunity."

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1 This issue is not a new issue in this matter. In
2 fact, as noted during oral argument, it was the first issue
3 raised by the Court at oral argument on the Michigan
4 agencies' motion to dismiss. The Court noted -- that is,
5 this Court noted, that if one could divorce the so-called
6 Form 400 theory from issues pertaining to whether there is
7 an applicable insurance policy and, therefore, whether the
8 debtor, having assumed all the policies, would be liable to
9 the insurers under such a policy, then this Court, the
10 District Court, and, I believe, the Second Circuit have made
11 it clear that that -- that dispute, the so-called, what I
12 call "pure" Form 400 theory dispute could proceed separate
13 and apart from, ultimately, the plan injunction issue
14 pursuant to the confirmation order in this case.

15 However, as addressed first by me at Pages 20
16 through 21 of my bench ruling on the motion to dismiss, as
17 well as by Judge Marrero, the parties and, in particular,
18 the Michigan agencies, have not been able to separate those
19 issues or divorce them, either as a matter of law or as a
20 matter of stipulation through -- that would be "so ordered"
21 by the Court.

22 Consequently, it was clear to me in January of
23 2010 and I believe is still clear to me today, based on the
24 very candid remarks of Mr. Raterink, that if I were to
25 modify the stay pending appeal to permit what Michigan

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1 contends is the Form 400 theory to proceed, it would subsume
2 the issues that are raised in this adversary proceeding,
3 issues that the Second Circuit has been crystal clear on are
4 ones that this Court has jurisdiction over because those
5 issues, as the Second Circuit stated, pertain inexorably to
6 whether there is going to be a viable claim or not against
7 the debtor's estate as well as to whether the debtor has an
8 insurance policy, or not, with the plaintiff insurers.

9 The Michigan agencies contend that I should review
10 or consider their motion under Bankruptcy Rule 7062 and,
11 more specifically, Bankruptcy Rule -- I'm sorry --
12 Bankruptcy Rule 7062 -- I'm sorry -- or more specifically
13 Federal Rule of Civil Procedure 62, which is incorporated by
14 Bankruptcy Rule 7062 and more specifically Federal Rule of
15 Civil Procedure 62(c), which deals with injunctions pending
16 an appeal of an interlocutory order.

17 However, I think that the proper way to look at
18 this is under Bankruptcy Rule 8005, which deals with stays
19 pending appeal and was the rule under which I entered the
20 January 28, 2010 order, which states, in pertinent part:

21 "Notwithstanding Rule 7062, the bankruptcy judge
22 may suspend or order the continuation of other proceedings
23 in the case under the Code or make any other appropriate
24 order during the pendency of an appeal on such terms as will
25 protect the rights of all parties in interest."

1 So, even to the extent that there's changed
2 circumstances that would justify modifying the order, I
3 believe in light of the very strong risk -- in fact, I
4 believe certainty -- that the contract and claim issues that
5 are front and center in this adversary proceeding are --
6 and, in fact, are the only issues in this adversary
7 proceeding, would be raised if I modified the January 28,
8 2010 order to permit the litigation based on the Michigan
9 agencies' definition of the so-called Form 400 issue; that
10 it simply would not be fair and protective of the parties to
11 modify the stay.

12 If the Michigan agencies want to preserve their
13 full panoply of arguments under their Form 400 issue,
14 including their arguments with respect to the insurers'
15 policy defense, then they need to wait upon a ruling on
16 their petition for cert, or, if they decide not to seek
17 certiorari of the Second Circuit's ruling, then we can
18 proceed on the merits of what is clearly before the Court in
19 the adversary proceeding which, again, as correctly stated
20 by the Second Circuit does not include this pure Form 400
21 issue, but only whether there's a policy in place, or
22 reformation.

23 So I will deny the motion and I'll ask counsel for
24 the insurers to submit an order consistent with this ruling.
25 The order does not need to be settled formally on the

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1 Michigan agencies, but you should cc their counsel or at
2 least run it by them before you send it by email to chambers
3 so they can --

4 MR. OLSHIN: Yes, Your Honor.

5 THE COURT: -- make sure it's consistent with my
6 ruling.

7 Okay. I would appreciate, I guess, the following:

8 If -- if -- well, I would like to know either way
9 whether either or both of the Michigan defendants do file a
10 petition for cert. If they don't, someone should schedule a
11 pretrial conference so I could focus on what -- what is the
12 next step in this litigation. If they do, then I'll at
13 least know sort of what the timing is.

14 MR. OLSHIN: Yes, Your Honor. We'll make
15 arrangements to make those notifications.

16 THE COURT: Okay. Thank you.

17 MR. RATERINK: Thank you, Your Honor.

18 THE COURT: Thanks.

19 MS. PRZEKOP-SHAW: Thank you.

20 THE COURT: Thanks.

21 And, again, I -- I -- it's beating a dead horse.
22 I -- I still am amenable to so ordering a stip along the
23 lines that, you know, we've been talking about.

24 MR. CAMPANARIO: Your Honor, the last item on the
25 agenda is a motion to dismiss by the defendants in an

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1 adversary proceeding that was brought by CAI Distressed Debt
2 Opportunity Master Fund Ltd and others. Davis Polk
3 represents the defendants in that adversary proceeding --

4 THE COURT: Okay.

5 MR. CAMPANARIO: -- so I'll turn it over to them.

6 THE COURT: That's fine.

7 MR. KAMINETZSKY: Good morning, Your Honor.

8 Benjamin Kaminetzsky of Davis, Polk and Wardwell for the
9 defendants.

10 As the Court is aware we are here today on the
11 defendants' motion to dismiss with prejudice plaintiffs'
12 adversary proceeding, which basically asks this Court to
13 revisit and completely rewrite the distribution scheme for
14 general unsecured creditors that is set forth in the
15 confirmation order, the plan of reorganization, the master
16 distribution agreement and the operating agreement, a
17 distribution scheme that, by plaintiffs' own admission in
18 their complaint, was heavily negotiated and approved by the
19 Court.

20 Now plaintiffs ask Your Honor to rewrite these
21 documents in the context of one of the most brutal and hotly
22 contested bankruptcy cases in recent history because, quite
23 frankly, the plain language of these documents will not
24 provide them with the recovery that they seek.

25 If I could -- it might just be easier and quicker

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1 if I could just hand up to Your Honor -- I made a little
2 booklet with just excerpts of the relevant documents.

3 There's nothing more than that, just so Your Honor doesn't
4 have to flip through multiple hundred-page documents. It
5 can just follow along. Would that be okay?

6 THE COURT: Well, if you've -- you know, have you
7 given a copy to the other side?

8 MR. KAMINETZSKY: Yeah. Here you go. And, again,
9 it's just --

10 THE COURT: All right.

11 MR. KAMINETZSKY: -- the relevant pages that I'm
12 talking about.

13 THE COURT: All right.

14 MR. KAMINETZSKY: At bottom, Your Honor, this is a
15 case -- simple case summarized clearly and succinctly in
16 plaintiffs' complaint at paragraph 54, and this is what the
17 -- I mean, I couldn't have said it better myself -- this is
18 what the complaint says: "The distribution of DAP stock to
19 DAL members in exchange for those members' DAL interests
20 constitutes a distribution within the meaning of the
21 Modified Plan, the MDA and the Operating Agreement."

22 So, if under the terms of the documents plaintiffs
23 cite -- the modified plan, the MDA and the operating
24 agreement -- these exchanges involved "qualifying
25 distributions," we may be on the hook and this lawsuit can

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1 continue. If --

2 THE COURT: Well, where -- where does the phrase
3 "qualifying distributions" come from? That's not anywhere
4 in the documents, right?

5 MR. KAMINETZSKY: No. Distributions. You're
6 right.

7 THE COURT: Okay.

8 MR. KAMINETZSKY: I'm just saying because
9 "distributions" is -- is a term that we have to talk about
10 what it means.

11 THE COURT: Okay.

12 MR. KAMINETZSKY: But you're right. If it's
13 "distributions," then we're on the hook. If they're not,
14 then the complaint must be dismissed.

15 The only dispute here is whether the exchange
16 transaction constitutes a "distribution." For the purposes
17 of this motion, there's no facts in dispute. So what was
18 the transaction at issue? Very briefly, as plaintiffs'
19 complaint explains, the DIP lenders set up an entity called
20 DIP Holdco III, LLC, for the purpose of acquiring Old
21 Delphi's assets. In the modified plan, the term "Company
22 Buyer" is defined as DIP Holdco III. That's important.

23 DIP Holdco III, LLC later became DIP Holdco, LLP
24 and then changed its name to Delphi Automotive, LLP,
25 referred to in the complaint and in the briefing as DAL. As

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1 the name suggests, the L part, this was an LLP, a
2 partnership, and the partners held membership interests in
3 DAL.

4 Now, the entity, DAL, wanted to conduct an IPO,
5 but this raised a problem. Generally, partnerships don't go
6 public, corporations do. And as every corporate lawyer
7 knows, the simple way to go public is to establish a shell
8 corporation that will exchange its shares for the partners'
9 membership units, and that's what happened here. DAL set up
10 a shell corp company called Delphi Automotive, PLC, referred
11 in the complaint as DAP, and DAP exchanged its shares for
12 the partners' membership units of DAL.

13 As a result, the partners who used to own
14 membership units in DAL now owned shares of DAP, a company
15 who, in turn, owned the membership units. DAP was then able
16 to go public and the old partners of DAL, now shareholders
17 of DAP, could sell their shares in an IPO.

18 I hope that's clear. I could --

19 THE COURT: What happened to the interests in the
20 -- in DAL?

21 MR. KAMINETZSKY: They just -- they're held by
22 DAP. It's pretty -- it's --

23 THE COURT: So it's an exchange, right?

24 MR. KAMINETZSKY: It -- perfectly -- exchanged.

25 Suppose Davis Polk wanted to go public --

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1 THE COURT: So -- so the interest holders in DAL
2 got shares of DAP --

3 MR. KAMINETZSKY: That's it.

4 THE COURT: -- in place of the shares that they
5 had in DAL?

6 MR. KAMINETZSKY: Right. It was basically --

7 THE COURT: So -- so isn't the -- I mean, so when
8 you cut through it, the issue is whether that constitutes a
9 "distribution," right?

10 MR. KAMINETZSKY: Well, there's three -- yeah. I
11 mean, we're cutting through -- exactly. I mean, that's one
12 of the three ways that they lose is that simply it wasn't a
13 distribution. A distribution, Your Honor, we all know -- we
14 were -- you, me, Mr. Johnston, we're all partners in a law
15 firm. So it's the same thing. A distribution occurs when
16 Davis Polk, Paul Weiss, whomever, has a million dollars and
17 they decide, okay, let's distribute it to the partners.

18 THE COURT: Well, the plan doesn't say cash.

19 MR. KAMINETZSKY: What? No. Let's say Davis Polk
20 wanted to distribute, I don't know, eraser boards.

21 THE COURT: Right.

22 MR. KAMINETZSKY: They would -- they would then
23 give -- take that and give it to the partners. How do you
24 know that happened, because the day before the distribution
25 there was a million dollars on their balance sheet. The day

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1 after the distribution there's no longer a million dollars
2 of cash, securities, whatever on their balance sheet because
3 it's now in the partners' pockets.

4 What happened here not a dime, a dime of DAL or a
5 penny went to the partners. Nothing was distributed. What
6 happened was, as Your Honor said, was there was just an
7 exchange of shares. The balance sheet of DAL didn't change
8 at all. Not one penny went from DAL to the partners'
9 pockets, nothing. To the extent that anyone did anything,
10 there was a DAL -- simply the membership -- the partners in
11 DAL simply exchanged one equity interest -- what we'll call
12 their membership interest in a partnership -- and got back
13 the amount of equity, stock in DAP. That's it. That's what
14 happens. It was an exchange.

15 And how do you know a distribution didn't occur,
16 just cutting right through it as Your Honor said? Because
17 if you look at the balance sheet the day before and the day
18 after, nothing changed. Why did nothing change? Because DAL
19 didn't give anybody anything.

20 So I guess if -- I -- what I want to do, Your
21 Honor, if you could bear -- you know, kind of give me two
22 minutes, I could walk you through the various documents.
23 It's very quickly and just to show you what exactly was the
24 distribution scheme in the plan and what wasn't the
25 distribution scheme in the plan, and show you that under the

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1 distribution scheme there had to be three -- there have to
2 be three criteria met in order for it to count to the 7.2
3 billion-dollar-threshold for the unsecureds.

4 So if you will indulge -- indulge me, let's start
5 with the terms of the modified plan. And the modified plan
6 says very simply -- and, again, we have, if you want to just
7 take a look, if you want to follow along in the excerpt book
8 -- it says on Page 33, Section 5.3: "On the effective date,
9 the disbursing agents shall establish a distribution account
10 to hold the proceeds, if any, of the general unsecured MDA
11 distribution." That's Section 5.3.

12 Now the general unsecured MDA distribution is a
13 defined term and is defined on -- in Section 1.102 of the
14 modified plan on Pages 14 and 50. And what does the word
15 say:

16 "'General unsecured MDA distribution' means if and
17 to the extent Company Buyer makes distributions to its
18 members in accordance with the buy -- the Company Buyer
19 Operating Agreement as described in Section 3.2.3 of the
20 Master Disposition Agreement in excess of \$7.2 billion, in
21 an amount equal to," and then it sets forth a certain
22 formula, up to \$300 million.

23 Now there are two documents listed in this plan
24 definition in black and white, but before we look at those
25 two documents, which is the operating agreement and the MDA,

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1 let me quickly note something that Your Honor's already
2 picked up on. We already know -- just by reading the
3 definition we already know two things:

4 One, for plaintiffs to be entitled to relief the
5 distribution must have been made by the "company buyer"
6 which is a defined term; and two, to count to the threshold
7 -- the 7.2 billion-dollar-threshold, a distribution must be
8 made.

9 If either or if certainly both of these criteria
10 were not met, if the alleged distributions were not made by
11 the company buyer or if there was no distribution at all,
12 plaintiffs lose. Please hold this thought because we're
13 just getting started.

14 Now let's look at the two agreements referenced in
15 the modified plan's definition of "general unsecured MDA
16 distribution."

17 So, the relevant portion of Section 3.2.3 of the
18 MDA is on Page 40 and states, if you go to the tab that
19 says, MDA, it's right there and I'm going to read it slowly:

20 "To the extent payable following the closing, the
21 Company Buyer" -- again, defined term -- shall pay to the
22 disbursement agent amounts payable to the unsecured
23 creditors of Delphi pursuant to the plan of organization and
24 the Company Buyer Operator agreement for distribution to
25 such unsecured creditors subject to the terms, conditions

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1 and limits set forth in the plan of reorganization and the
2 operating agreement."

3 Again, "subject to the terms, conditions and
4 limits set forth in the plan of reorganization and such
5 operating agreement."

6 Please note that the -- that the words are very
7 clear and precise. The company buyer, which both parties
8 agree refers to DAL, the partnership, has to pay the general
9 unsecured creditors only if the distributions were made
10 pursuant to both the modified plan and the operating
11 agreement. And just in case that language wasn't clear
12 enough, the end -- the MDA -- the same paragraph emphasizes
13 that any obligation to the unsecureds is subject to the
14 terms, conditions and limits set forth in the plan of
15 reorganization and such operating agreement.

16 Now let's look finally at the operating agreement,
17 which both the modified plan and the MDA specifically
18 reference. We'll look at Section 5.6 entitled, payments
19 pursuant to master distribution agreement. It states:

20 "In accordance with Section" -- and, again, if you
21 want to just follow along in the -- in the booklet it's
22 under operating agreement.

23 "In accordance with Section 3.23 of the MDA" --
24 that's the section we just looked at, Your Honor -- "if the
25 asset purchase is consummated pursuant to the plan of

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1 reorganization once an aggregate of 7.2 billion has been
2 paid as capital d "Distributions" to the holders pursuant to
3 this agreement, the company shall pay an amount," and then
4 it's based on the formula up to \$300 million.

5 And Section 1.1 on Page 4 contains the definition
6 of capital d "Distributions." And here we go.

7 "Distributions" means:

8 "Each distribution, after the effective date, made
9 by the company to a member, whether in cash, property, or
10 securities of the company, pursuant to or in respect of
11 Article 5 or Article 10."

12 So, by simply reading the words of these three
13 documents, in order to be a qualifying "distribution" that
14 would count to the 7.2 billion threshold, the transaction
15 must be three things:

16 One, a distribution of cash or property;

17 Two, made by the Company Buyer, C.B -- that's DAL
18 to its members; and

19 Three, made pursuant to Article 5 or Article 10 of
20 the operating agreement.

21 You need to satisfy all three criteria to be a
22 qualifying distribution or to be a distribution. And as
23 detailed in your -- in our papers, Your Honor, the exchanges
24 at issue were, on its face, the Holy Roman Empire of
25 distributions. They were not distributions. They were not

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1 made by DAL, and they were not made pursuant to Article 5 or
2 Article 10 of the operating agreement. Plaintiffs are
3 literally zero for three.

4 So let's -- we've already touched on this, but
5 let's go -- talk about distributions.

6 Company buyer is a partnership, okay, and as we
7 talked about a -- we know how partners distribute cash or
8 other property. Is that what happened here? How much cash
9 or property was distributed? The answer is nothing. On the
10 day of the transaction the partners simply exchanged their
11 membership units in DAL for equity in DAP. Not a single
12 cent of DAL cash, property was distributed to the partners.

13 So returning to what we talked about, the balance
14 sheet was completely unchanged. Now to a corporate lawyer
15 and under the law, the difference between a distribution of
16 assets and an exchange of shares is both clear and vast.
17 And if you take a look at the example of the I -- the
18 Internal Revenue Code set forth on Page 4 or 5 -- 4 and 5 of
19 our reply brief it explains this in a very understandable
20 way.

21 Under the tax code a distribution by a partnership
22 is taxable -- is a taxable event, unfortunately for me,
23 while the exchange of equity in a partnership for shares in
24 a corporation is not taxable. Why? The case law says
25 because it was a change in form, "not in substance." And

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1 in an economic sense, there was a mere change in the form of
2 ownership. A change in form is exactly what we're talking
3 about now. It's as if Davis Polk, LLP set up a company
4 called Davis Polk, Inc. and the partners exchanged shares
5 for Davis Polk, LLP for Davis Polk, Inc.

6 So what do plaintiffs say? How can they say a
7 distribution occurred when not a single penny was
8 distributed? They say, yes, the modified plan, the MDA and
9 the operating agreement used the term "distribution," but
10 what those documents really, really mean -- or in
11 plaintiffs' words on Page 12 of their brief "The obvious
12 concern and purpose was to ensure that if those assets
13 ultimately proved to be worth more than \$7.2 billion
14 unsecured creditors would be entitled to payment." That's
15 what they say. I didn't make that up. They suggest that
16 they are entitled to distributions based on the enterprise
17 value of DAL.

18 Now, Your Honor, we both have seen plans that are
19 -- when recover -- based on recoveries -- where recoveries
20 are based on enterprise value or in plaintiffs' parlance on
21 what the assets are worth. The problem for plaintiffs is,
22 as we just saw from the documents, this is not such a plan.
23 And as detailed in Page 10 to 12 of our reply brief, if for
24 no -- some unknown reason the words of the modified plan
25 itself is not strong enough evidence that the distribution -

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1 - the recoveries were based on distributions and not what
2 enter -- what the value of the assets were, the ultimate
3 nail in plaintiffs' enterprise theory is the fact that in
4 previous unconsummated plans in this case unsecured recovery
5 was based on enterprise value.

6 And it gets even better, because the unsecured
7 creditors committee, the UCC, of course understood the
8 difference between the unconsummated plan which was based on
9 enterprise value, and the later plans that were based on
10 distributions. And, you know what, they objected
11 vociferously. If you could just take a look on Pages 11 and
12 of our reply, this is from the unsecured creditors'
13 objection. I'm quoting. Recoveries would "not be based on
14 debtors' total enterprise value." That's from the UCC's
15 objection, Paragraph 33.

16 Another one, "The value of the assets would be
17 completely irrelevant to whether the general unsecured
18 creditors receive any distribution." That was Paragraph 9.

19 The reorganized debtors "actually have to generate
20 and distribute substantially more than 7.2 billion in actual
21 cash returns to its equity before the unsecured creditors
22 receive a penny, even a penny."

23 And my favorite quote, "Even if the value of
24 reorganized debtors' membership interests were worth tens of
25 billions of dollars in the future, general unsecured

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1 creditors would not receive a penny unless reorganized
2 debtors, among other things, distributed 7.2 billion of its
3 members."

4 So to the -- to suggest that the modified plan
5 intends to implement a distribution scheme similar to that
6 of the unconsummated plan is completely contrary to the
7 words, but also contrary to what everyone knew at the time.
8 It is simply pure fantasy.

9 So if the Court finds that there was no
10 distribution -- and there wasn't -- game over. The motion
11 to dismiss must be granted.

12 Then we get to -- so that's -- they failed prong
13 one, and if you fail any of the prongs you're out. So there
14 was no distribution.

15 THE COURT: Well, there was no distribution by
16 DAL.

17 MR. KAMINETZSKY: There was no distribution by
18 DAL. Query, whether there was a distribution by anyone, but
19 here we're getting to now the DAL point. So the question is
20 -- okay. So now let's assume what Your Honor is saying.
21 Remember, the definition of --

22 THE COURT: Well, you're -- you're saying there
23 was no distribution by anyone because the IPO just
24 established the value of the interests that -- that the
25 former partners and now shareholders have. It wasn't -- it

1 wasn't a payment to them.

2 MR. KAMINETZSKY: Right. Well --

3 THE COURT: it just made their interest more
4 easily tradable.

5 MR. KAMINETZSKY: Exactly, but it's -- but it --

6 THE COURT: And established a market price for it.

7 MR. KAMINETZSKY: Yeah. But it's even more than
8 that, Your Honor, because, again, if you recall the
9 definitions that we saw in the -- in the documents was that
10 it has to be a distribution by the Company Buyer.

11 THE COURT: Well, no. That's the second point.

12 MR. KAMINETZSKY: Right.

13 THE COURT: I mean, I --

14 MR. KAMINETZSKY: I understand what you're --

15 THE COURT: You said it's not a distribution --
16 you spent most of the last ten minutes telling me why it
17 wasn't a distribution -- why it wasn't by the company buyer,
18 but the earlier point was that it's not a distribution,
19 either because --

20 MR. KAMINETZSKY: It's just an exchange.

21 THE COURT: -- it just fixes the value of the
22 interest. It doesn't -- it doesn't result in anyone
23 receiving something in respect of that interest. It just
24 makes that interest publicly tradable and --

25 MR. KAMINETZSKY: Right. And -- and one of the

1 requirements, as maybe we'll talk about a little later is
2 that the exchange had to be exactly pro rata. In other
3 words, no one was supposed to get more or less of the stuff,
4 of the partnership. It was -- you know, it's literally what
5 you said. It used to be called a membership unit in an LLP
6 and now I'm getting the concomitant amount of equity in this
7 shell company that -- whose only asset is the membership
8 units.

9 So I guess it's hard to keep the three things
10 separate, but now like segueing into the Company Buyer
11 point, right. We already talked about how DAL didn't
12 distribute anything to its members. Okay. But they say --
13 so to the extent anyone gave anything to anybody, it was
14 DAP, not the Company Buyer, but DAP, the PLC, the company
15 that did the exchange.

16 So what do plaintiffs say about that? In other
17 words, the -- not in other words, the words of the plan say
18 company buy -- the only thing that qualifies are
19 distributions by Company Buyer. Not a dime left the Company
20 Buyer. To the extent anyone gave anything to anybody it was
21 the DAP giving these shares in a corporation whose only
22 asset was what you already had anyway.

23 So what do they say about that? They say, well,
24 the fact that it says Company Buyer doesn't really mean it
25 has to be just Company Buyer. And they say the fact that it

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1 was DAP and not DAL should be ignored because DAL and DAP
2 are affiliates. And then they throw in like the alter ego
3 and say that they should all be considered and collapsed
4 into one. And then they throw in some what-ifs and a parade
5 of horribles to suggest that the Company Buyer should be --
6 requirement should be ignored because theoretically DAL
7 could funnel distributions through an affiliate and,
8 therefore, avoid their obligations under the modified plan,
9 something that never happened.

10 I could say a lot about this, but let me limit
11 myself to two points because I think Your Honor has it.

12 First, the exchange at issue was not some sort of
13 clever policy -- plot cooked up to re-route distributions to
14 a dummy affiliate. These precise transactions, these pre-
15 IPO transactions, including the creation of DAP, was
16 explicitly and specifically laid out and contemplated in the
17 controlling documents.

18 If you look, Your Honor, at Section 14.13 of the
19 operating agreement it's entitled, Further Action, Initial
20 Public Offering, and talks about setting up an entity
21 called, Issuer, and describes how DAL members will
22 contribute their "respective membership interest to a newly
23 formed corporation, i.e. the Issuer, in exchange for equity
24 in the Issuer." This is exactly the transaction that
25 happened, that was alleged in the complaint.

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1 And just to state the obvious, just the modified
2 plan could have been based on enterprise value, the
3 definition of "distribution" could have included
4 distributions by the Issuer, but it doesn't.

5 And to -- for the plaintiffs to suggest that the
6 Court should rewrite the controlling documents because
7 Delphi did something that was always contemplated and set
8 forth in black and white in Section 14.13 of the operating
9 agreement just so it could get paid is unsupportable.

10 THE COURT: Well, it does -- it does say here that
11 this -- well, the -- unless I'm misreading this, that the
12 "common equity securities of the Issuer shall reflect the
13 residual interests of the members pursuant to Section
14 5.1(a)(iv)."

15 MR. KAMINETZSKY: Right. That --

16 THE COURT: So there --

17 MR. KAMINETZSKY: -- proves the point we were just
18 talking about. That means that -- what that means, what
19 that's saying is exactly what we -- the dialogue we just had
20 two seconds ago is that that means that there -- no one
21 should be gaining or losing, getting more or less than what
22 they -- what they had before. In other words --

23 THE COURT: Well, but -- but I think what you're
24 suggesting, though, is that this is a separate argument from
25 the argument that you were making, which is that, in

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1 essence, it's the same thing and there's not been a
2 distribution, because here I think what you're saying is
3 that by going through the Issuer the right to a distribution
4 is cut off for all time.

5 So that, for example, if the -- if the Issuer sold
6 its assets or, you know, and there was, under your
7 definition, a distribution as opposed to just a -- you know,
8 turning the interest into stock, the rights under the plan
9 wouldn't -- would have been cut off.

10 MR. KAMINETZSKY: Yeah. You know, interesting
11 question. It's just not -- it's interesting. What you're
12 saying is that, so let's say the DAL does what -- a real
13 distribution, but it has to get --

14 THE COURT: No. DAP does.

15 MR. KAMINETZSKY: Yeah. Well, DAP -- the only
16 thing that it has to distribute -- it doesn't have anything
17 other than holding the membership units of DAL. It's a
18 shell that the only asset is just I'm -- the membership
19 units. It's really just a shell corporation on top that's
20 between the partners --

21 THE COURT: Well, if someone buys DAP's stock --

22 MR. KAMINETZSKY: Right. Yeah. I -- I don't -- I
23 mean, again, it's not presented in these facts so I'm not
24 sure we have to decide this, but it's not -- I mean, again,
25 the words "Company Buyer" are pretty clear.

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1 And, Your Honor, the point here is -- the only
2 point I'm trying to make here --

3 THE COURT: But what I'm saying is I think that --
4 that if the Company Buyer changes its stripes and becomes,
5 you know, super Company Buyer --

6 MR. KAMINETZSKY: Company Buyer, Inc.

7 THE COURT: Yeah, or company -- yeah. Company
8 Buyer, Inc, or -- or, you know, Company Buyer LLP II and
9 gets distributed all of the assets of -- of the original
10 Company Buyer, it would seem to me that that would either be
11 an amendment to this operating agreement that would be
12 precluded from -- by the confirmation order from cutting off
13 the right to up to 300 million, or it would have to be done
14 as explicitly recognized by this Section 14.3 where it would
15 reflect the residual interests which I think would -- are
16 impressed with this right to up to 300 million.

17 MR. KAMINETZSKY: Right. So that -- that's what
18 happened here. I mean, it's what -- the reason why we're
19 not confronted with your scenario, Your Honor, is because
20 what they're suing us for is precisely what we did pursuant
21 to 14.13 of the operating agreement. We did -- you know,
22 look what it's written. It's called Further Action: IPO.
23 We wanted to do the IPO that we always wanted to do and we
24 did it precisely according to 14.13.

25 And it could have been the company -- in other

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1 words, the plan of reorganization could have said if you do
2 distributions or if you do an IPO they get paid. It didn't
3 say that.

4 THE COURT: Well, in other words you're -- you're
5 saying that the two or three horrible hypotheticals that are
6 raised in the objection to the motion to dismiss really --
7 that -- that your arguments wouldn't apply to those
8 hypotheticals because it's a -- those are situations that
9 weren't contemplated by the -- by the parties.

10 MR. KAMINETZSKY: I -- I don't -- I'm not able to
11 speak to that. What I'm saying is that I -- I -- again,
12 it's not enough to defeat the plain words of a court order
13 and documents by saying possibly someone could do something
14 untoward. They're saying that what happened here is a
15 distribution and clearly it wasn't. If -- if --

16 THE COURT: Okay. All right.

17 MR. KAMINETZSKY: -- in some future -- in some
18 future time --

19 THE COURT: That's fine.

20 MR. KAMINETZSKY: -- we do something that we
21 haven't done and they want to sue us again for that, I guess
22 that will be for another day. But, again, you know, they're
23 not saying we did any of that. They're saying we did the
24 IPO and that IPO, that exchange transaction, is a
25 "distribution" by the Company Buyer; and the answer is, it's

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1 not, and the answer is, it was fully contemplated, and the
2 plan could have said, if you do an IPO -- which we've seen
3 in other plans -- and the value of the asset is worth X, we
4 get paid.

5 THE COURT: Okay.

6 MR. KAMINETZSKY: It -- it just didn't.

7 THE COURT: All right.

8 MR. KAMINETZSKY: Okay.

9 If we could just -- if we could just now go on to
10 the final point, and this, I think, is just the -- quite
11 frankly, the -- just to review. So we have -- we don't have
12 a distribution and we don't have it by the Company Buyer.

13 THE COURT: When you say we don't have a
14 distribution, at this -- at this level you're saying we
15 don't even have a lower case distribution.

16 MR. KAMINETZSKY: Yeah. We don't have a lower
17 case distribution, capital distribution, subscript of D --

18 THE COURT: Well, no. Let's just leave it at
19 lower case --

20 MR. KAMINETZSKY: Right.

21 THE COURT: -- because now you're going to make
22 the capital D distribution argument, right?

23 MR. KAMINETZSKY: Yeah. I think they're going to
24 make it. But, basically, what they're saying is that the
25 third prong -- so we needed Company Buyer. We needed

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1 distribution. No. No. And now it had to be pursuant to
2 Article 5 and 10 of the operating agreement.

3 Now plaintiffs also lose for the third time
4 because what happened here wasn't pursuant to Article 5 and
5 Article 10 of the distribution agreement. So there's no
6 dispute that Article 10 -- sorry -- of the operating
7 agreement. So there's no dispute that Article 10 doesn't
8 apply. That leaves Article 5 and as -- as I just explained,
9 though, Section 14.13, that's Article 14 of the operating
10 agreement contemplates the very type of exchanges DAP
11 carried out with DAL members. So Article 5 doesn't apply.

12 So what do plaintiffs say in response to the clear
13 requirements in the operating agreement that only
14 distributions under Article 5 or 10 count? Well, after
15 spending a page telling the Court how various online
16 dictionaries define the word distribution, and perhaps my
17 favorite sentence in plaintiffs' brief, they say on Page 12,
18 and I'm quoting:

19 "To be sure, both the modified plan and the MDA do
20 make reference to the operating agreement. That reference,
21 however, does not magically incorporate into the modified
22 plan the terms of the operating agreement."

23 Let me say that again:

24 "To be sure, both the modified plan and the MDA do
25 make reference to the operating agreement. That reference,

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1 however, does not magically incorporate into the modified
2 plan the terms of the operating agreement."

3 Yes, it does. When a document says in "accordance
4 with, pursuant to, and subject to the terms, conditions and
5 limits as set forth in," abracadabra aside, magically
6 incorporate is precisely what the words do. What else do
7 they do?

8 Now plaintiffs also suggest that because a pre-IPO
9 transaction under Article 14 had to be done on the same pro-
10 rata basis as Article 5 distribution, the words in the
11 operating agreement that read, "pursuant to Article 5 or
12 Article 10" should nevertheless be read pursuant to Article
13 5, Article 10 or Article 14. Again, the prospect of an IPO
14 was detailed in the documents and the definition of
15 qualifying distribution could have included an IPO, but it
16 doesn't.

17 So with nowhere else to go what do plaintiffs do?
18 They implore the Court to simply ignore the operating
19 agreement, pretend it doesn't exist, throw it away. Well,
20 why? They have two suggestions:

21 First, they suggest that the terms of the modified
22 plan and the operating agreement conflict. No, they don't.
23 They can be -- they are and can be perfectly harmonized.
24 Happy to go through it again, but at this point Your Honor
25 is probably sick of looking at this language. Where is the

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1 conflict? The case law is clear that even when you're
2 dealing with private contracts, not court-approved orders,
3 you don't look for conflicts. You try to harmonize.

4 THE COURT: But can I -- can I cut through this a
5 little bit?

6 MR. KAMINETZSKY: Yeah.

7 THE COURT: It seems to me that -- well, you
8 haven't addressed the payments to GM and the PBGC. You've
9 so far just been focusing on -- on the IPO.

10 MR. KAMINETZSKY: Yeah, because they don't -- I'm
11 sorry.

12 THE COURT: But -- but as far as that is
13 concerned, I think that this capital D argument really is
14 just a restatement of the argument that the IPO wasn't a
15 distribution, lowercase d.

16 MR. KAMINETZSKY: Yeah. Again, there's --

17 THE COURT: But it --

18 MR. KAMINETZSKY: -- two things to say --

19 THE COURT: But it --

20 MR. KAMINETZSKY: -- one is that, yeah. A
21 distribution is a word that has meaning and it's not a
22 distribution no matter -- again, look at their definitions
23 of distribution from the Webster dictionary and from Flags.
24 It means --

25 THE COURT: Right.

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1 MR. KAMINETZSKY: -- somebody gives stuff to
2 someone else.

3 THE COURT: But on the -- on the other hand I --
4 it seems to me that there's only one way that there are
5 actual distributions made under this operating agreement and
6 that is either through Article 5 or Article 10 --

7 MR. KAMINETZSKY: Right.

8 THE COURT: -- on dissolution, or if you amend the
9 agreement. You get the consent of the parties to amend the
10 agreement.

11 MR. KAMINETZSKY: Right.

12 THE COURT: So it seems to me given that the order
13 says you're not allowed to amend the agreement to get around
14 the deal, the -- all the real distributions here are under
15 Article 5, right?

16 MR. KAMINETZSKY: Well, no. They --

17 THE COURT: Even -- even the GM and PBGC
18 distributions are -- are under Article 5 because they're
19 either under Article 5 or there's been an amendment to the
20 agreement.

21 MR. KAMINETZSKY: No, because, Your Honor, let me
22 say two things. The first thing is that the GM and PBGC
23 distributions don't matter because even they admit it
24 doesn't get them to the 7.2 --

25 THE COURT: No. I -- I understand that.

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1 MR. KAMINETZSKY: But, no. See, that would be
2 fine, but they -- if there wasn't Article 12 and Article 12
3 of the operating agreement -- see, what Article 5 talks
4 about these pro rata distributions -- and we could talk
5 about it. I just don't know if Your Honor wants to spend a
6 lot of time on it because it doesn't matter because they
7 admit that the only -- that they only win or they only
8 survive if the exchange offer --

9 THE COURT: Well, Article 12 requires additional
10 consent, though, right? So you're, in essence, amending the
11 agreement.

12 MR. KAMINETZSKY: Let me -- let me take a look at
13 it.

14 THE COURT: And you're saying that the
15 distribution went to GM and PBGC under Article 12, but that
16 required an amendment. So then you run afoul of the order.

17 MR. KAMINETZSKY: No. No. No. I'm sorry. 12.2.

18 THE COURT: Right. Okay. Okay. Right.

19 MR. KAMINETZSKY: Okay. So it says:

20 "In addition to the approval of the board of
21 managers, the company shall take -- shall not take directly
22 or indirectly any of the action listed below nor permit any
23 of the subsidiaries to do so directly or indirectly without
24 consent of the majority initial class A holders."

25 So that -- that -- my understanding if that's who

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1 we got -- we got consent. I mean, that's not the
2 unsecureds. That's -- and then, B, if you look -- just flip
3 the page, for so as long as the initial Class A holders own
4 at least ten percent -- which we did -- of the Class A
5 membership interest, then we could take out GM and the PBGC.

6 So these -- these -- these distributions, the ones
7 that, you know, they're saying were Article 5 distributions
8 were specifically not Article 5 distributions. They weren't
9 pro rata distributions. They were distributions pursuant to
10 Article 12, which is not 5 and not 10, but is something
11 else.

12 THE COURT: But this provision isn't -- isn't one
13 that provides for a distribution. It just -- it provides
14 for a --

15 MR. KAMINETZSKY: Redeem, purchase or otherwise
16 acquire for value any membership interests, redeems them.

17 THE COURT: But you -- you have to get the consent
18 to do that.

19 MR. KAMINETZSKY: We -- the consent of whom, Your
20 Honor? Look -- let's flip back.

21 THE COURT: The other members.

22 MR. KAMINETZSKY: No.

23 THE COURT: The holders, the Class A holders.

24 MR. KAMINETZSKY: The majority of initial Class A
25 holders.

1 THE COURT: Right. I know. The committee didn't
2 bargain for their consent right here.

3 MR. KAMINETZSKY: Right.

4 THE COURT: But --

5 MR. KAMINETZSKY: In other words, this document
6 authorizes to do exactly what we did under not Article 5,
7 not Article 10, but Article 12. So that's -- that just
8 doesn't count because we saw the operating to be a
9 distribution. It has to be pursuant to Article 5 or Article
10 10.

11 (Pause)

12 THE COURT: Well, I guess the question I have
13 there is -- so you're saying that the available cash
14 available for distribution to the members under Section
15 5.1(a) now doesn't include -- now has this tax on it, in
16 essence, under 12.2(a)?

17 MR. KAMINETZSKY: Yes, or -- or said another way,
18 that what we have to -- what counts towards the 7.2 billion-
19 dollar-threshold are distributions as defined here and
20 distributions as defined here are only distributions under
21 Article 5 and Article 10 --

22 THE COURT: Well, all right. But 5.1 says all
23 available cash available for distribution to the members may
24 be distributed to the extent approved by the board of
25 managers in accordance --

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1 MR. KAMINETZSKY: May be distributed.

2 THE COURT: -- with the applicable provisions of
3 this Article 5.

4 MR. KAMINETZSKY: Yeah. May be distributed under
5 --

6 THE COURT: Right.

7 MR. KAMINETZSKY: -- Article 5 --

8 THE COURT: Right.

9 MR. KAMINETZSKY: -- but it may be distributed as
10 specifically contemplated in Article 12.2, and the
11 difference is Article 5 distributions count and Article 12
12 distributions do not count.

13 THE COURT: But why doesn't Article 12 just --
14 just modify the priorities here and these are available --
15 this is -- this is available cash, but you've modified the
16 waterfall in 5.1(a) through the consent to the redemption in
17 12.2?

18 MR. KAMINETZSKY: Because that's what -- that's
19 what -- yes. That's what the document does. I suppose that
20 is because it was always contemplated that we would want a -
21 - I'm making this up. I wasn't part of the -- but that we
22 wanted to take GM and the PBGC out, so there was a specific
23 provision addressed to that. And that was bargained for. I
24 mean, these are documents that were court-ordered.

25 THE COURT: No. I understand. I'm just not --

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1 I'm just telling you I -- I don't necessarily read there
2 being more than two distributions sections in this
3 agreement. The redemption section can easily be read as
4 just simply modifying the order of priority that you make
5 distributions.

6 MR. KAMINETZSKY: But it talks about -- it talks
7 about redeem, purchase or otherwise acquire. It talks about
8 taking them out.

9 THE COURT: Right.

10 MR. KAMINETZSKY: And that's what we did with --

11 THE COURT: Right.

12 MR. KAMINETZSKY: -- as we were authorized --

13 THE COURT: With cash, available cash.

14 MR. KAMINETZSKY: Right, which we were authorized
15 to do.

16 THE COURT: Right.

17 MR. KAMINETZSKY: But --

18 THE COURT: Why is that inconsistent with 5.1(a)?

19 MR. KAMINETZSKY: Because it didn't have -- again,
20 pursuant to Article 5 is -- Article 5 requires you when you
21 do these distributions to do it according to the waterfall
22 that Your Honor just talked about.

23 THE COURT: Except as modified by -- by the
24 agreement.

25 MR. KAMINETZSKY: Right. So we --

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1 THE COURT: By 12 -- by 12.2.

2 MR. KAMINETZSKY: Right. Exactly. So we didn't
3 do it through Article 5. We did it through Article 12.

4 THE COURT: No. That -- that just sounds too cute
5 to me. I mean, you could -- you could easily then say that
6 -- I mean --

7 MR. KAMINETZSKY: You know, Your Honor, I
8 disagree, but the good news is that's probably -- that -- if
9 we win on the exchange offer --

10 THE COURT: Right.

11 MR. KAMINETZSKY: -- this case is over.

12 THE COURT: Okay.

13 MR. KAMINETZSKY: And then it's just -- you know,
14 we could fight about the \$2 billion, does it count or not
15 count --

16 THE COURT: Right.

17 MR. KAMINETZSKY: -- if and when there's a further
18 distribution.

19 THE COURT: Right. Okay.

20 MR. KAMINETZSKY: Let me just conclude and then --
21 because I think -- if Your Honor has got it --

22 THE COURT: All right.

23 MR. KAMINETZSKY: And, again, the last five
24 minutes was not on the exchange offer. It was just on the 2
25 billion issue --

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1 THE COURT: Right.

2 MR. KAMINETZSKY: -- not on the --

3 THE COURT: Right.

4 MR. KAMINETZSKY: -- not on the IPO.

5 THE COURT: Right.

6 MR. KAMINETZSKY: So what do they do about, again,
7 the Article 5 and Article 10 problem, requirement with
8 respect to the exchange offer.

9 THE COURT: Right.

10 MR. KAMINETZSKY: And they basically then are left
11 to say that the Court should just basically throw out the
12 operating agreement. They should ignore it and, why,
13 because it was allegedly withheld from the public.

14 Once again, there's a lot to say, but the
15 confirmation order approved the operating agreement and
16 ordered it "binding in all respects upon all creditors and
17 any holder of interest, whether known or unknown," and of
18 course Your Honor had a copy of the agreement. So to
19 suggest that the operating agreement is not binding is a
20 direct impermissible collateral attack on the confirmation
21 order.

22 And, of course, the sealing order makes clear that
23 the unsecured creditors' committee had a copy of the
24 operating agreement and the PBGC was on the creditors'
25 committee and most of the plaintiffs are suing on behalf of

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1 themselves and the PBGC -- I mean, to say that it was a
2 secret document. . . .

3 But more than that, and here's really the kicker,
4 there's no allegation in the complaint that they didn't have
5 access to the terms of the operating agreement. In fact,
6 the allegations are precisely the opposite. Paragraph 32 of
7 the complaint says:

8 "The provisions of the agreements relevant --
9 agreement relevant to this lawsuit" -- referring to the
10 operating agreement -- "are readily apparent through a
11 review of related documents."

12 And Paragraph 35 says:

13 "On information and belief, all provisions of the
14 operating agreement related to or affecting distributions to
15 holders of general unsecured claims of the debtors were
16 replicated faithfully in the LLP agreement in accordance
17 with the requirements of the confirmation order."

18 And it was. And for good measure they attach a
19 copy -- two copies of the LLP agreement to their complaint.

20 So for them to suggest -- they basically tried to
21 do an amendment without looking. In the complaint they said
22 they had the operating agreement or the relevant provisions,
23 and in their brief they say it was secret and withheld and
24 it shouldn't matter and -- and ignore it.

25 I guess I could go on, but I see you've had it

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1 with me. So in the words of Winston Churchill, I'm just
2 making the rubble bounce.

3 Just -- the fully contemplated exchange
4 transaction in exchange for the fully contemplated IPO, and
5 we saw it laid out in Section 14.13, were not distributions
6 of assets. They were exchanges of equity. They were not
7 made by the company -- company buyer, DAL. They were made
8 by the issuer, DAP, and they were not made pursuant to
9 Article 5 of the -- or 10 of the operating agreement. They
10 were made pursuant to Article 14. Plaintiffs are zero for
11 three and this isn't baseball. One strike is enough for
12 their complaint to be dismissed.

13 Unless you have questions I'll sit down now and
14 let Mr. Johnston --

15 THE COURT: Okay.

16 MR. KAMINETZSKY: -- comment.

17 THE COURT: Okay.

18 MR. JOHNSTON: Good morning, Your Honor. Jim
19 Johnston of Dewey and LeBoeuf on behalf of the plaintiffs.
20 This is my first time appearing before you.

21 THE COURT: Good morning.

22 MR. JOHNSTON: It's a pleasure to be here.

23 Your Honor, this is a case about entitlement to
24 distributions under the plan of reorganization, the one that
25 you confirmed two-and-a-half, almost three years ago. I

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1 noted from the agenda that this is the seventy-fifth omnibus
2 hearing and while that's impressive, I'm sure you had hoped
3 to be rid of the matter by now.

4 I can tell you that my clients, all of whom are
5 general unsecured creditors certainly hoped to have received
6 what was promised to them under the plan, the relatively
7 modest amount of \$300 million, by now. Unfortunately, they
8 haven't received a dime, or to use Mr. Kaminetzsky's phrase,
9 a penny. The defendants have made it clear, in fact, that
10 they do not intend to pay the 300 million now due under the
11 plan. And so here we are. This is a case to compel
12 performance of the plan, to compel performance and payment
13 of that \$300 million.

14 And it is a case that, first and foremost, hinges
15 on the plain language and meaning of the plan. I'll agree
16 with Mr. Kaminetzsky about that. As I'll explain, the plan,
17 in no uncertain terms, provides that unsecured creditors are
18 due payment when the "Company Buyer makes distributions to
19 its members in excess of \$7.2 billion." I'll explain why
20 that's happened.

21 In an effort to dismiss this case now, you've
22 heard the defendants say that the plan doesn't really mean
23 what it says. When you -- when the plan uses the term,
24 "distributions," it doesn't really mean all distributions,
25 just those that fit within a narrower term, "Distributions,"

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1 from an agreement that wasn't disclosed, that was secret,
2 that was never on the public docket at the time of
3 confirmation.

4 THE COURT: Well, can I interrupt you?

5 MR. JOHNSTON: Yes.

6 THE COURT: I can -- I can sort of see your
7 argument on the redemptions to the PBGC and GM. I'm having
8 a very hard time seeing your argument with regard to the
9 IPO. The L -- the limited partnership interests in DAL, and
10 I know there was a predecessor, but we're just referring to
11 the DAL --

12 MR. JOHNSTON: Yes.

13 THE COURT: -- the limited partnership interests
14 were not public, but they were transferable. You know,
15 hedge fund Y could have bought some of those interests or
16 all of them from the holders of those interests. That
17 wouldn't be a distribution, would it? That wasn't -- that's
18 not covered by this. That's a -- the assets of DAL are
19 still there, right?

20 MR. JOHNSTON: Agreed. A transfer of the limited
21 partnership interests --

22 THE COURT: Okay.

23 MR. JOHNSTON: -- while technically permitted
24 under very limited circumstances as a practical matter
25 didn't happen.

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1 THE COURT: All right. So -- so instead of that,
2 what happens is DAL, through the share transaction with DAP,
3 goes public. So now the ownership interests are -- and I
4 for the moment I'm accepting that you might be able to treat
5 DAP and DAL as the same -- so the ownership interests are
6 now public and there's a price put on them, right? That's
7 the only difference, is that there's a market price put on
8 them. There -- how is that a distribution?

9 MR. JOHNSTON: In a couple of ways, Your Honor.
10 We allege, and as you indicated you said that you
11 would accept the allegation that for present purposes --

12 THE COURT: Well, just for the purpose of this
13 hypothetical.

14 MR. JOHNSTON: Yes. For -- for present purposes -
15 -

16 THE COURT: Right.

17 MR. JOHNSTON: -- DAP is the same as DAL.

18 THE COURT: Right.

19 MR. JOHNSTON: DAP was owned and controlled by
20 DAL. DAP's only directors were DAL's CEO and --

21 THE COURT: No. Just --

22 MR. JOHNSTON: -- general counsel.

23 THE COURT: -- for the purpose of this
24 hypothetical --

25 MR. JOHNSTON: Uh-huh.

1 THE COURT: -- I'm accepting that. So -- but,
2 again, how is -- how is -- the -- increasing the ability to
3 monetize the ownership interests a distribution?

4 MR. JOHNSTON: The -- because there was a
5 distribution of that DAP shares to DAL's members, a
6 technical distribution. There was a transfer of that
7 property and -- and that transfer of property actually was
8 the essence of the transaction because it enabled the
9 members of DAL to monetize their illiquid assets and to turn
10 those illiquid assets into cash.

11 THE COURT: But so what? It doesn't have any --
12 it -- it's -- it's --

13 MR. JOHNSTON: Well --

14 THE COURT: The assets are still there.

15 MR. JOHNSTON: They're not there, though. I mean,
16 keep in mind, Your Honor, that this was no ordinary IPO in
17 which an Issuer raises capital for future operations and the
18 like. The Issuer here didn't receive a dollar of proceeds.
19 All of the IPO proceeds went directly to the company buyer's
20 members. And what have they been doing since the IPO? All
21 of the former member -- or yeah -- the former members of
22 DAL, now the shareholders of DAP, they've been liquidating
23 their investments.

24 To give you one example, Paulson and Company sold
25 20 million shares into the IPO. They made \$453 million in

1 the IPO. Since then they've sold another four-and-a-half-
2 million-dollars, making another -- or four-and-a-half-
3 million shares making another 140 million. That's \$700
4 million to one member of Company Buyer.

5 THE COURT: But the agreement did not provide that
6 either -- that -- that this right, this contingent right to
7 get up to \$300 million, that it was triggered either by a --
8 you know, a public valuation of DAL or the monetization of
9 DAL's members interests.

10 MR. JOHNSTON: No. The agreement provided for
11 when the members of DAL took out of the company, received in
12 respect of their ownership interests \$7.2 million, then
13 unsecured creditors were entitled to be paid.

14 THE COURT: Well --

15 MR. JOHNSTON: And what our --

16 THE COURT: -- it -- it doesn't say that. I mean,
17 you could provide that. You could -- you could easily have
18 said in the agreement -- not you because you didn't draft
19 it.

20 MR. JOHNSTON: Correct.

21 THE COURT: But the creditors' committee could
22 have -- could have provided that, you know, we get -- I
23 haven't done the math -- like forty-five percent of every
24 distribution -- not every distribution, every proceed of
25 your membership interest in DAL, or any successor over and

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1 above your pro rata share of \$7.2 billion. It doesn't say
2 that.

3 MR. JOHNSTON: No. But the plan provided that
4 when the partners, the limited partners of this partnership,
5 the Company Buyer, received distributions --

6 THE COURT: Right.

7 MR. JOHNSTON: -- which as a practical matter was
8 the only way that they could get a return on their
9 investment above a certain amount, then unsecured creditors
10 got paid. What the transactions here have done have
11 completely eliminated the -- that happening in the future.

12 And -- and I was going to end with this, but I
13 think it's appropriate to turn to it. We have alleged, and
14 I think it's appropriate, what this transaction has done has
15 basically frustrated the purpose of the plan.

16 Even if these transactions somehow didn't qualify
17 as a distribution within the meaning of the plan, under the
18 allegations of the complaint the defendants have still
19 breached the plan because the new structure put into place
20 means that the 7.2 billion-dollar-threshold will be
21 certainly much harder to satisfy and probably will never be
22 satisfied, frustrating the purpose of the plan itself and
23 the deal that was implemented in the plan.

24 THE COURT: Well --

25 MR. JOHNSTON: Under --

1 THE COURT: Can I interrupt you there?

2 MR. JOHNSTON: Uh-huh.

3 THE COURT: I mean, it -- certainly, the
4 possibility of an IPO must have been in the minds of the
5 people that prepared this. In fact, in -- and I -- it's
6 expressly contemplated in Section 14 -- I'm sorry -- 4.13.

7 MR. KAMINETZSKY: 14.

8 THE COURT: I'm sorry. 14.13. So I -- and I --
9 you know, I went back and looked at the supplemental
10 disclosure statement for the modified plan and it really
11 just refers to the -- I think, unless you can point me to
12 other language -- it really just refers back to this
13 operating agreement. It doesn't say, for example, if you
14 get money in any way, shape or form on account of your
15 ownership interest above your pro rata share of 7.2 billion
16 you're going to pay the rest on this sharing formula. It
17 doesn't say that. I mean, I --

18 MR. JOHNSTON: I think --

19 THE COURT: -- I think if -- if people had relied
20 on that, I would be much more inclined to deny this motion.
21 But it just goes back to the operating agreement again.

22 MR. JOHNSTON: Well, two points on that.

23 One, the operating agreement absolutely did
24 contemplate exactly what happened here. The insertion of
25 this shell company between the partnership and the members

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1 and then an IPO. And --

2 THE COURT: Right.

3 MR. JOHNSTON: -- as you observed earlier Section
4 14.13(b) provides for a distribution of the shares in
5 exactly as was set forth in Article 5 of the operating
6 agreement.

7 THE COURT: Right.

8 MR. JOHNSTON: That tells me that what happened
9 here was a distribution and it was a distribution --

10 THE COURT: Well, can I ask you --

11 MR. JOHNSTON: -- under Article 5.

12 THE COURT: -- on that score -- and that's the
13 only way I can conceivably, I think, accept your argument.
14 The shares as distributed by DAP, I guess you could argue,
15 were impressed with this right, right, the right to get up
16 to \$300 million? I guess that's the -- I mean, to me that's
17 the only argument you could make here. And that -- so that,
18 therefore, when you sell the shares in the future, you know,
19 if your pro -- if your pro rata share of that adds up to
20 more than \$7.2 billion along with all the other
21 distributions that are made not through share sales,
22 arguably there is -- you know, there's a -- there's an
23 obligation to pay that over. Although I don't know how you
24 -- how you would possibly monitor that.

25 MR. JOHNSTON: It's not a matter of selling shares

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1 in the future. It's -- they -- they got cash equivalent by
2 virtue of these NYSE traded shares that the operating
3 agreement itself says has to go out through the Article 5
4 waterfall.

5 But I --

6 THE COURT: So you're saying --

7 MR. JOHNSTON: -- I did want to refer --

8 THE COURT: -- the shares themselves have to go
9 out that way?

10 MR. JOHNSTON: No. The shares -- the shares
11 reflect the Article 5 distributions and -- and they say the
12 -- at first you have to give preferred securities with
13 preferences reflecting the amount of the distributions set
14 forth in Sections 5.1(a)(1) through --

15 THE COURT: But how do you -- how do you -- maybe
16 I -- as a practical matter how do you calculate that? Are
17 you -- I mean, it would seem to me that --

18 MR. JOHNSTON: You --

19 THE COURT: -- if the new shares are issued
20 they're issued pursuant to Section -- let's just say they're
21 stamped with 5.1(a)(iv), okay. They're stamped with that --
22 that burden on them, okay. So then what? How does -- how
23 do you get to your 300 million at that point?

24 MR. JOHNSTON: It -- it -- the 300 million is
25 satisfied because --

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1 THE COURT: No, but who -- who pays it? How does
2 it get paid?

3 MR. JOHNSTON: DAL or DAP, but --

4 THE COURT: Out of its capital?

5 MR. JOHNSTON: Out of -- out of -- yes, because
6 what DAL has done is it's distributed property with a market
7 value of \$22 a share aggregate \$7.2 billion value that the
8 market put on it to its members who can then go do what they
9 wish with it. So it's not a question of going out and
10 tracking down individual members who say, gee, did you sell
11 on X and Y date, give us, you know, your share of the
12 obligation to pay the \$300 million.

13 I -- I did want to return, Your Honor to --

14 THE COURT: Well, but I guess the --

15 MR. JOHNSTON: The distribution happened --

16 THE COURT: Okay.

17 MR. JOHNSTON: -- upon the --

18 THE COURT: All right.

19 MR. JOHNSTON: -- transaction. All of this was
20 simultaneous. Exchange, IPO, members got publicly traded
21 market valued shares.

22 I did want to go back to the idea that -- that
23 somehow the operating agreement itself is the be all end all
24 of the question here as opposed to the plan. I want to say,
25 you know, first, it's an odd contention given what happened

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1 in the case.

2 What we've heard is that a fundamental limitation
3 on the unsecured creditors only right to payment under the
4 plan isn't contained in the plan. It's not contained in the
5 confirmation order. It's not contained in the master
6 distribution agreement that was actually filed with the
7 plan, but it's in this operating agreement that was only
8 filed under seal, can't be found anywhere in the public
9 record or the bankruptcy cases.

10 I think, Your Honor, coming into this as someone
11 who wasn't there at the time that that can't be. This was
12 the one provision of the plan that unsecured creditors cared
13 about. It was so important that Your Honor specifically
14 ordered in Paragraph 64(g) of the confirmation order that
15 the rights to the MDA distribution couldn't be amended,
16 modified or waived to reduce, eliminate or otherwise affect
17 the distributions to unsecured creditors.

18 But we're supposed to believe that this allegedly
19 critical limitation was buried in a non-public document that
20 unsecured creditors never saw.

21 THE COURT: But it's -- it's -- it's in every
22 provision. It's in every public provision.

23 MR. JOHNSTON: Well, not to the extent that Mr.
24 Kaminetzsky says. It simply says "in accordance with the
25 Operating Agreement." And what happened here? These --

1 THE COURT: Well, it says --

2 MR. JOHNSTON: -- exchange transactions --

3 THE COURT: -- subject to the terms and conditions

4 --

5 MR. JOHNSTON: -- were in accordance --

6 THE COURT: It says "subject to the terms,
7 conditions and limits --

8 MR. JOHNSTON: Yes.

9 THE COURT: -- set forth in the POR and the
10 Company Operating Agreement."

11 MR. JOHNSTON: Yes. And -- and --

12 THE COURT: And there's no dispute that the people
13 that negotiated this deal had access to the operating
14 agreement, right?

15 MR. JOHNSTON: I -- I assume that that's the case.
16 I assume that that's the case, but it never found its way --

17 THE COURT: And no one raised -- no one objected
18 to confirmation or to the supplemental disclosure statement
19 and said, "wait a minute, this is -- I want to see it. I'm
20 not going to rely just on the committee. I want to see it
21 myself and know what's happening."

22 MR. JOHNSTON: On -- on what grounds would they
23 have had reasons to do so? The plan --

24 THE COURT: Because they want to see the -- they
25 want to see the agreement.

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1 MR. JOHNSTON: But the plan on its face is crystal
2 clear. It just says distributions to members in amounts
3 above \$7.2 billion. There -- there was no disclosure that
4 the operating agreement limited creditor rights. Creditors
5 had absolutely no reason to seek it out.

6 THE COURT: Well, actually, I mean, the
7 supplemental disclosure actually says to unsecured
8 creditors: "pro rata share of deferred consideration under
9 the master disposition agreement."

10 MR. JOHNSTON: Well the master disposition
11 agreement was disclosed.

12 THE COURT: And it refers to the -- it refers to
13 this agreement, the operating agreement. So --

14 MR. JOHNSTON: Yes, but there's --

15 THE COURT: -- I mean, honestly --

16 MR. JOHNSTON: -- there's no --

17 THE COURT: -- if you're -- if you're doing your
18 due diligence on this, you either -- you either trust in the
19 committee's judgment or you say "I want to see it," and I
20 probably would have let them see it. At least they could
21 have signed a confidentiality agreement and seen it, but no
22 one wanted to see it.

23 MR. JOHNSTON: We -- we don't know if anybody
24 wanted to see it or not.

25 THE COURT: Well, I know because no one asked for

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1 it.

2 MR. JOHNSTON: No. But once there's a sealing
3 order in place in a bankruptcy court it's -- I'm -- you have
4 far more experience than I do.

5 THE COURT: The sealing order contemplates the
6 ability to sign a confidentiality agreement, even -- even if
7 you -- even if you believe that the sealing order can't be -
8 - can't be --

9 MR. JOHNSTON: I don't believe that's the case,
10 Your Honor.

11 THE COURT: But that's -- but that -- look, I --

12 MR. JOHNSTON: I mean, there --

13 THE COURT: You're -- I -- you're not going to win
14 on this argument. I'm sorry. It's not going to work.

15 MR. JOHNSTON: Okay. The -- again, if there was a
16 general description that was misleading, this argument would
17 work because then you would have conflicting documents, but
18 you're led right back to the operating agreement.

19 Now you -- you make the argument that the
20 operating agreement in two or three ways isn't as rigid as
21 Mr. Kaminetzsky is saying and I -- I understand that in
22 part. But if you don't have the operating agreement what do
23 you -- what do you have? I mean, it's --

24 MR. JOHNSTON: You have the very --

25 THE COURT: I mean, you could basically say that -

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1 - that it could be an enterprise value. It could be
2 anything.

3 MR. JOHNSTON: Well, no. You have the plain
4 common sense meaning of the plan, which is what creditors
5 did --

6 THE COURT: All right.

7 MR. JOHNSTON: -- have access to.

8 THE COURT: Then if there is \$7.2 billion of what?

9 MR. JOHNSTON: Are distributed to the members of
10 DAL, then unsecured creditors become entitled to the sharing
11 formula set forth --

12 THE COURT: Okay.

13 MR. JOHNSTON: -- in the --

14 THE COURT: And, again --

15 MR. JOHNSTON: -- definition of the plan --

16 THE COURT: -- distributed -- distributed --
17 distributed by whom, by DAL or by the public buying the
18 shares that these people have in DAL? I think that's --
19 that's your real hurdle here.

20 MR. JOHNSTON: Well, and --

21 THE COURT: And that's a -- that's a very
22 significant distinction.

23 MR. JOHNSTON: And --

24 THE COURT: And it's a -- it's such an obvious
25 distinction I would have to assume the parties were aware of

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1 it when they were negotiating this. It's one thing to say
2 that we get this right, which you would normally get through
3 a warrant or, you know, through some form of equity whenever
4 the value -- you know, that we could monetize just like
5 they're monetizing it, just like the owners are monetizing
6 it, you know, a contingent value right or a warrant, if
7 it's, you know, turned into -- into publicly tradable
8 shares.

9 But to say a "distribution" is really a different
10 -- I mean, who is making the distribution here? The only
11 way, again, I -- I can see this argument, and I want to hear
12 Mr. Kaminetzsky's response to it, is that "distribution" not
13 only means that the entity in which your -- in which the
14 investors owned an interest in pays them something, which is
15 I think the normal definition of a distribution, which is --
16 you know, you get something from your limited partnership,
17 in this case or your corporation. You get a dividend. You
18 get a redemption. You get something directly from it.

19 But I think your argument is saying, well, that's
20 -- you know, it's more than that. It's if they could ever
21 monetize it in any way, including getting a greater fool to
22 buy their interest in it, then you get a share of that. And
23 there's so many ways to actually add that in, none of which
24 were done here.

25 MR. JOHNSTON: And that --

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1 THE COURT: You know, you get a right of first
2 refusal. You get a warrant. You get an option. I mean,
3 it's -- those are all things that -- that cover that second
4 alternative as opposed to just a payment, a distribution by
5 the -- you know, by the limited partnership.

6 MR. JOHNSTON: And -- and the second alternative
7 is not our argument. The --

8 THE COURT: Well --

9 MR. JOHNSTON: -- argument here is that the
10 distribution of --

11 THE COURT: Was getting the common shares.

12 MR. JOHNSTON: -- of the common shares --

13 THE COURT: All right.

14 MR. JOHNSTON: -- is a qualifying distribution
15 under -- it -- it is a distribution that counts toward the
16 \$7.2 billion and --

17 THE COURT: And -- and why is that --

18 MR. JOHNSTON: -- it counts --

19 THE COURT: -- why is that a distribution?

20 MR. JOHNSTON: Because what the defendants here did
21 was take the limited partnership interests, convert them
22 into something that's essentially equivalent to cash, and
23 distributed it to members who can then do what they wish
24 with it.

25 THE COURT: Okay.

1 MR. JOHNSTON: That --

2 THE COURT: But why is that a distribution?

3 MR. JOHNSTON: Because it then enabled the members
4 to realize the values of their interests --

5 THE COURT: But that's --

6 MR. JOHNSTON: -- which is the same as a --

7 THE COURT: But that's not a distribution in my
8 mind. That's -- that's, again, selling your interest as
9 opposed to getting something from -- I mean, DAL is still
10 worth what it's worth, right? It's still --

11 MR. JOHNSTON: Yes.

12 THE COURT: It's still impressed with this -- this
13 three -- up to three-hundred-million-dollar tax or interest
14 that --

15 MR. JOHNSTON: Well, let me --

16 THE COURT: -- that your clients have along with
17 all the other unsecured creditors. So if someone ever wants
18 to sell DAL, then they'll get their money.

19 MR. JOHNSTON: But who is going to sell DAL?

20 THE COURT: Well, I don't know.

21 MR. JOHNSTON: Do --

22 THE COURT: I mean, but it would seem to me that
23 that's the question that the people should have been asking
24 when they negotiated the deal.

25 MR. JOHNSTON: Let me -- let me drill down on

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1 this. Under the pre-IPO structure, the individual members
2 of DAL controlled DAL and they had the economic interest in
3 receiving a return on their investment, right? Over time it
4 stood to reason that those members would actually direct DAL
5 to make distributions at appropriate times. That way they
6 would recoup their investment. You saw that happen --

7 THE COURT: Right.

8 MR. JOHNSTON: -- with the distributions to GM and
9 PBG, some --

10 THE COURT: Right. I understand that.

11 MR. JOHNSTON: -- four-million-dollars went out
12 the door.

13 THE COURT: Right. And I'm much more sympathetic
14 to your arguments there than I am on this other point.

15 MR. JOHNSTON: And -- and that was the status when
16 the plan was struck, the plan deal was struck.

17 Now what do we have? We have DAL controlled by a
18 publicly owned holding company, DAP, from which there's no
19 need for DAL to get distributions. DAP wholly owns DAL.
20 All of DAL's financial results and balance sheets are rolled
21 up into DAP for accounting and reporting purposes --

22 THE COURT: But why can't we --

23 MR. JOHNSTON: -- as -- as a --

24 THE COURT: Let me interrupt you. Why can't --
25 why can't this very easily be interpreted, and appropriately

1 interpreted, to say that the ownership interests in DAP are
2 impressed with this up to three-hundred-million-dollar
3 right, and whenever DAP makes a dividend or redemption or
4 sells its assets or sells DAL's assets, then, you know, you
5 keep totting those up and when they add up to 7.2 billion,
6 along with any distributions that occurred before the IPO,
7 then the 300 million kicks in?

8 MR. JOHNSTON: But -- but the point is -- is that
9 how is DA -- how and why would DAP make a dividend?

10 THE COURT: Well, but -- but wait. You're --
11 you're -- I mean, you're buying the stock because you think
12 it's worth something, right? At some point it's not just a
13 shell game. You actually have to look at the value of the
14 company.

15 MR. JOHNSTON: Which -- which is -- which is the
16 point. The value of the company is all rolled up into this
17 -- into DAL.

18 THE COURT: Well, I am assuming that the price
19 that they paid for the stock included the calculation that
20 this 300 million would have to get paid some day. I mean,
21 that --

22 MR. JOHNSTON: Well --

23 THE COURT: -- that affects the price --

24 MR. JOHNSTON: That -- that raises an --

25 THE COURT: -- right?

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1 MR. JOHNSTON: -- interesting point. What did the
2 company say about the 300 million when they issued the
3 shares? And this is in our complaint. When you look at the
4 S1 that -- that accompanied the IPO, what do they say? They
5 say that the "contingency of member distributions exceeding
6 \$7.2 billion is not considered probable of occurring." They
7 said it's not going to happen.

8 THE COURT: Well, when? At what point --

9 MR. JOHNSTON: Ever --

10 THE COURT: -- in the future --

11 MR. JOHNSTON: Ever.

12 THE COURT: -- or -- or as part of this
13 transaction?

14 MR. JOHNSTON: No. No. Ever.

15 THE COURT: Well --

16 MR. JOHNSTON: Their disclosure is that -- their
17 disclosure is that it will never happen.

18 THE COURT: Well, but that doesn't --

19 MR. JOHNSTON: And --

20 THE COURT: I mean, the people who bought the
21 stock may have a cause of action over that, but -- but you
22 guys don't, do you?

23 MR. JOHNSTON: That -- we have a cause of action
24 because what they've done is frustrate the fundamental
25 purpose of --

1 THE COURT: Well --

2 MR. JOHNSTON: -- this plan provision.

3 THE COURT: All right.

4 MR. JOHNSTON: They -- they've done this
5 transaction. At the same time they tell the market this
6 contingency of future member distributions isn't going to
7 happen. It's not going to happen and why is it not going to
8 happen, because the new structure they've put in, for all
9 intents and purposes, means that there will never be those
10 distributions.

11 THE COURT: Well, but was there anything that --
12 that -- in the documents that precluded them from doing this
13 structure? I mean, they -- in fact, it's specifically
14 contemplated in 14.13.

15 MR. JOHNSTON: It's specifically contemplated in
16 14.13 and -- and as we argued, we believe that 14.13 then
17 incorporates the distribution provisions and reaffirms our
18 argument that what this was really was a distribution and it
19 really was a distribution of material assets worth -- worth
20 billions of dollars.

21 THE COURT: All right. Well, I guess that's -- to
22 me that's the only issue. Is -- is whether that was -- that
23 stock that the limited partners received was a distribution
24 or simply a -- a non-material transformation of their
25 ownership interests. And -- well, I guess I can see that

1 the stock itself might be impressed with this right of the
2 unsecureds. It's hard for me to see how it's a distribution
3 or that DAP -- I -- better yet, DAP is impressed with this
4 right. It's hard for me to see how it's a distribution.

5 It -- it says that there's -- that you're supposed
6 to get -- ignoring the preferred securities -- common equity
7 securities of the issuer reflecting the residual interests
8 of the members pursuant to Section 5.1(a) (4) .

9 MR. JOHNSTON: And -- and before that preferred
10 equity securities.

11 THE COURT: Right.

12 MR. JOHNSTON: Right.

13 THE COURT: Okay. So -- was it just common or was
14 it preferred issued as part of the IPO? I thought it was
15 just common.

16 MR. JOHNSTON: I will find that out.

17 THE COURT: But -- all right. Anyway, it's --

18 MR. JOHNSTON: I think it was just common.

19 THE COURT: I mean, it -- it does -- the other one
20 -- okay. So -- so how -- how does that language make it a -
21 - make the receipt of the shares an Article 5 distribution?
22 Even though it does refer to Article 5, how does it make it
23 a distribution as opposed to just saying you're getting --
24 you're getting your stock pursuant to the interest that's
25 laid out in (a)(iv)?

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1 MR. JOHNSTON: Well, the distribution is by virtue
2 of the fact that this was DAL property, the shares of DAP.

3 That's -- that's the allegation in the complaint. And --

4 THE COURT: But how --

5 MR. JOHNSTON: And then -- and then to defeat the
6 technical argument that somehow it doesn't really count as a
7 distribution unless it's a "Distribution" and then it has to
8 be a "Distribution" only if it occurs under Article 5 or
9 Article 10, what we read 14.13(b) as doing is saying that
10 that distribution of property, which is contemplated under
11 the operating agreement, has to adhere to Article 5. That's
12 -- that's what this says.

13 I mean, Article 5 --

14 THE COURT: Well, it says they get --

15 MR. JOHNSTON: -- sets forth --

16 THE COURT: Well, actually, what it really says is
17 they get -- they get the -- it gets distributed to them in
18 the percentages in 5.1(a)(iv).

19 MR. JOHNSTON: Right, which -- which is exactly
20 how distributions of property are made.

21 THE COURT: But 5.1(a) talks about distributions
22 of available cash. 5.3 talks about distributions of assets
23 other than cash. But how is -- how is this -- how is the
24 issuance of the stock in return for the ownership interest
25 distribution of property of -- of -- of DAL? It's not.

1 It's a substitution of the interests in DAL for another
2 interest. It's not a distribution of DAL's property.

3 MR. JOHNSTON: When -- when you combine it with
4 the instantaneous issuance of the public and sale of the
5 public shares by the members, what it did was distributed
6 DAL's property.

7 THE COURT: It didn't distribute DAL's property.
8 It distributed the ownership interests. It just made it
9 more -- it made it more -- it made it market -- it made it
10 more marketable, but --

11 MR. JOHNSTON: Right.

12 THE COURT: I guess that's my problem with this.
13 I mean, I -- it goes back to my original question. I don't
14 see a conceptual or, you know, logical difference between
15 selling an LLP interest and selling a stock interest. I do
16 see that this language in the documents limits the
17 unsecureds' ability to monetize the -- their contingent
18 interests. But I think that's what it does --

19 MR. JOHNSTON: Well, and --

20 THE COURT: -- particularly when there are all
21 these other ways that you can take care of that problem that
22 aren't dealt with here.

23 MR. JOHNSTON: That --

24 THE COURT: And believe me, you know, I -- I would
25 be flabbergasted if the issue of warrants or contingent

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1 value rights or some appraisal mechanism wasn't raised. I
2 mean, it's -- those are all extremely well known ways to
3 deal with this type of problem.

4 MR. JOHNSTON: Well, Your Honor, that's one of the
5 things that discovery in this case will show.

6 THE COURT: But --

7 MR. JOHNSTON: And -- and we have --

8 THE COURT: But why do I have to have discovery on
9 it when the documents don't deal with this --

10 MR. JOHNSTON: We --

11 THE COURT: -- scenario? They don't -- they don't
12 cover the ability to tag along with the equity. They only
13 deal with the ability to get paid out of the LLP --

14 MR. JOHNSTON: Your Honor --

15 THE COURT: -- and, arguably, any successor.

16 MR. JOHNSTON: -- one -- one of the causes of
17 action in our complaint is -- gets to precisely that subject
18 and -- and that is that by virtue of this transaction the
19 defendants have frustrated the purpose of the plan.

20 Now maybe discovery will show that everyone
21 contemplated this and that warrants were asked for and
22 rejected, that there was some other kind of instrument was
23 on the table and wasn't -- and wasn't ultimately adopted and
24 that everybody understood that if an IPO like this happened
25 there wouldn't be a distribution and unsecured creditors

1 wouldn't have any rights.

2 Certainly, the public documents don't show that.

3 Certainly, the record available to unsecured creditors at
4 the time the plan was confirmed don't show that. Responding
5 to one of Mr. Kaminetzsky's assertions earlier that our
6 complaint says, well, yeah, everybody knew because the LLP
7 agreement had similar provisions. The LLP agreement didn't
8 come on the scene until after confirmation. It was --

9 THE COURT: Well, I think --

10 MR. JOHNSTON: -- the agreement that replaced the
11 --

12 THE COURT: -- I mean --

13 MR. JOHNSTON: -- operating agreement.

14 THE COURT: I think the complaint really says that
15 you have the documents now as opposed to then.

16 MR. JOHNSTON: Right.

17 THE COURT: So I -- I don't think it's an
18 admission that you had the documents then rather than
19 they're -- they're available now.

20 MR. JOHNSTON: And -- and if you look at Count III
21 it alleges that:

22 "Defendants frustrated the rights of holders of
23 general unsecured creditors of the debtors in violation of
24 an implied covenant of good faith and fair dealing in the" -

25 -

1 THE COURT: But why is the --

2 MR. JOHNSTON: -- "modified plan."

3 THE COURT: But -- well, but I -- I don't -- I
4 mean, if the language of the contract is clear, why is there
5 any sort of implied covenant of good faith? The contract
6 speaks for itself. You don't get to that.

7 MR. JOHNSTON: Well, which --

8 THE COURT: The --

9 MR. JOHNSTON: -- contract are we talking about?

10 If we're talking about the plan --

11 THE COURT: You're talking about the --

12 MR. JOHNSTON: -- then the --

13 THE COURT: Oh, well, I -- okay. That's the
14 argument -- that the issue I -- I told you you were going to
15 lose on for sure --

16 MR. JOHNSTON: All right.

17 THE COURT: -- which is that something other than
18 the operating agreement is going to govern here. I -- I
19 just -- it's --

20 MR. JOHNSTON: All right. Well --

21 THE COURT: It's just not -- I mean, the very
22 provision that deals with this -- let me just turn to it is
23 1.102 that says, you know, "in accordance with the Company
24 Buyer Operating Agreement." I mean, everyone knew there was
25 a document there. And 3.2.3 of the MDA refers to the

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1 "Company Operating Agreement."

2 So, you know, it -- that's -- that's where you
3 look. That's the first place you go to.

4 MR. JOHNSTON: If you could see it.

5 THE COURT: Well, you could have -- no one asked
6 to see it, and, you know, that's their problem, I guess.

7 MR. JOHNSTON: Let me turn briefly to the
8 distributions to General Motors and PBGC and I --

9 THE COURT: Okay.

10 MR. JOHNSTON: -- I understand what Your Honor
11 said earlier and, obviously, we agree. But I think that the
12 fact of -- that the defendants are making the argument that
13 four-and-a-half-billion-dollars distributed directly in cash
14 by DAL to members doesn't count as a distribution to meet
15 the plan threshold, I think, bears a fair amount on their
16 arguments with respect to the other question because they --
17 they're trying to treat this as a game of --

18 THE COURT: Well --

19 MR. JOHNSTON: -- gotcha.

20 THE COURT: -- but let -- but let's assume I -- I
21 think that at a minimum the agreement is ambiguous on this
22 point, and maybe even go so far as to think that that's got
23 to be a distribution. You're not close yet, right? There's
24 -- there's a few billion dollars to go.

25 MR. JOHNSTON: There is a few billion dollars to

1 go.

2 THE COURT: Right.

3 MR. JOHNSTON: That's right. And -- and if Your
4 Honor does not give us leave to amend to address any
5 concerns you have in the complaint, if you say come back
6 when there's another two, two-and-a-half-billion-dollars of
7 distributions made, the problem we're going to be faced with
8 is the practical realities -- and this goes to the breach of
9 the covenant of good faith -- that the structure the
10 defendants have put in place makes it highly unlikely that
11 there will be future distributions and --

12 THE COURT: They're never going to make a
13 dividend?

14 MR. JOHNSTON: They -- they have no reason to make
15 a dividend. That's the point that I was making earlier.

16 DAP can store all the excess cash. It can make
17 purchases directly. It can do deals. It can direct buyer
18 to pay a -- a third party directly. There's -- and
19 shareholders get the benefit of the enterprise value.
20 They're getting the benefit of the flow to the stock. They
21 -- it's -- the people who bought this stock are buying the
22 enterprise value. They're not buying it for dividends.
23 There's not going to be a dividend. There's -- there's no
24 reason that any dividend would -- would be made in the
25 future. And that goes to --

1 THE COURT: How do I know that? I mean, I -- I
2 am assuming -- I mean, among other things, that's why this
3 provision was in here, is that if there are distributions,
4 redemption of stock, dividends. I mean, they -- they sell
5 it, they sell the assets, they're just going to plow it back
6 into the company as opposed to -- to giving some of that
7 back to the shareholders?

8 MR. JOHNSTON: The shareholders who hold NYSE
9 traded shares and are able to then realize the value, the
10 appreciated value that way.

11 THE COURT: Well, okay.

12 MR. JOHNSTON: I think that's all I have, Your
13 Honor.

14 THE COURT: Okay.

15 MR. JOHNSTON: Okay. Thank you.

16 THE COURT: Thanks.

17 MR. KAMINETZSKY: Can I speak very brief or --

18 THE COURT: Yeah. I mean, the issue I wanted you
19 to address, although you can talk about other stuff, too, if
20 you want, is what is your response to the argument that when
21 the limited partners in DAL got their -- got the stock in
22 DAP they got a -- that -- that stock was impressed with the
23 requirement that once they receive value in excess of 7.2
24 billion that 300 million has to come out. So, in essence,
25 the right was triggered at that point.

1 MR. KAMINETZSKY: A couple of things, Your Honor.
2 One is it just -- I mean, you could say a cat is a dog and
3 you can say a dog is a cat, but if you read -- forget the
4 operating agreement, just read 1.102. It says "General
5 Unsecured MDA Distribution means if and to the extent
6 Company Buyer makes distributions to its member in
7 accordance with the company" --

8 THE COURT: Right.

9 MR. KAMINETZSKY: -- the MDA and the buyer in
10 excess of 7.2, the Company" -- and we've talked about this -
11 - and I think the best way to think about this is there's a
12 lot of case law on this. The Internal Revenue Code says
13 there's two different things and they're treated very
14 differently and everyone knows the difference if you're a
15 corporate lawyer -- is that there's a distribution of assets
16 and the way you know if the distribution occurred of assets
17 of a partnership is you look at the balance sheet the day
18 before and the day after. If it's changed, there must have
19 been a distribution. If there's a negative it must have
20 been a distribution.

21 Here, as Your Honor has said, nothing left DAL and
22 what the -- what the IRS has found and there's lots of case
23 law on this and it's cited in our brief, that all that an
24 exchange is, it's just that. You had a membership unit and
25 now you have a -- a stock. They didn't get a -- who --

1 there was a distribution by whoever bought their stock, by
2 the underwriter or by the public shareholder.

3 Again, DAL didn't cash out or -- or do anything.
4 That's -- I mean, that's the -- that's the answer is that
5 you can twist and -- I mean, somehow plaintiffs are
6 approaching this case like they have a constitutional right
7 -- hedge funds have a constitutional right to a distribution
8 and any document that says that they don't has to be
9 rewritten.

10 And, Your Honor, this would maybe be a little bit
11 interesting if -- two things, one is if there wasn't Section
12 14.13 that contemplated this very transaction, the pre-IPO
13 exchange and the IPO. That would maybe be interesting.
14 Hey, nobody thought of this. This was a surprise. But
15 everyone thought of it. It wasn't a surprise and, as you
16 said, the creditors committee didn't negotiate for -- for
17 it.

18 Your Honor, I've been involved and Your Honor has
19 been involved in plans that were based on enterprise value.
20 Everyone knows how to draft such a plan. Dewey Ballantine
21 does, Skadden does. I mean, you had really sophisticated
22 lawyers. This would also be a little bit more interesting
23 if there wasn't a previous plan in this case that was based
24 on enterprise value, and when this plan came out the UCC
25 went crazy. I read to you the quote saying, wait a second.

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1 This is nuts. There could be tens of billions of dollars of
2 enterprise value and we won't get a penny. Surprise. Guess
3 what? There could be an IPO. There could be tens of
4 billions of enter -- tens of billions of enterprise value
5 and they don't get a penny because that's what the words
6 say. I mean, it's -- it's hard -- it's -- you could turn
7 this into an enterprise value plan, but I humbly suggest
8 three years later is not the time to revisit very clear
9 words in the plan.

10 The -- and just a couple of -- a couple of points.
11 We're playing along with this idea and we put a footnote in
12 our brief that this is like a contract dispute and, you
13 know, we could pretend it's a contract dispute. But it --
14 you know, Your Honor, it's not a contract dispute, these
15 were not private contracts and now we're coming to a court
16 as a third party and saying what do these things -- help us,
17 what does this mean. These are all documents approved
18 pursuant to the Court order after a confirmation process, et
19 cetera.

20 They -- and -- and the -- which goes to the point
21 is, you know, they talk about Mr. Johnston said, you know,
22 he wants discovery. I'm not sure whose discovery he's
23 talking about. Your Honor approved these documents.
24 They're "so ordered" by the Court. The plan specifically
25 says the plan -- sorry. The confirmation order specifically

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1 says that the operating agreement, the plan --

2 THE COURT: Well, if -- if -- if the -- if the
3 documents were ambiguous then they would be entitled to
4 discovery.

5 MR. KAMINETZSKY: Of who, of what Your Honor
6 thought when --

7 THE COURT: No. The --

8 MR. KAMINETZSKY: -- you read the --

9 THE COURT: -- the parties who negotiated on them,
10 what they were -- what they said and so forth.

11 MR. KAMINETZSKY: I'm not sure -- but -- okay.

12 But there --

13 THE COURT: I mean, otherwise, how do I know what
14 they mean?

15 MR. KAMINETZSKY: Well, because -- I mean, I guess
16 --

17 THE COURT: I mean, it's not --

18 MR. KAMINETZSKY: Okay.

19 THE COURT: -- it's not enough just to say that
20 they're there, because that doesn't -- that doesn't really
21 answer the question. But I think I know what they mean, so

22 --

23 MR. KAMINETZSKY: Okay.

24 THE COURT: -- it doesn't matter.

25 MR. KAMINETZSKY: But I'm not sure -- if -- it's -

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1 - so the question would be what does "in accordance with"
2 mean, what does "pursuant to" mean, and what does "subject
3 to the terms and limitations" mean. I mean, that's the kind
4 of discovery that they want to take. It doesn't -- it
5 doesn't make any sense. The MDA says you get distributions
6 if -- pursuant to, subject to and -- and subject to the
7 terms and conditions and limits.

8 The other thing that I found surprising is that,
9 you know, this idea that the operating agreement was secret
10 or anything else. They bought into this deal and they've
11 already admitted that for litigation purposes they were able
12 to quickly figure out the terms of the operating agreement.

13 THE COURT: Well, these -- these particular
14 plaintiffs, you're saying.

15 MR. KAMINETZSKY: Right.

16 THE COURT: Yeah.

17 MR. KAMINETZSKY: So, I mean, like in other words
18 --

19 THE COURT: That's fair. I mean --

20 MR. KAMINETZSKY: I can't be their insurer -- if
21 you have a document that -- if you have an instrument that
22 says you're distribution is contingent on -- contingent on
23 the terms of an operating agreement, you could either get
24 the operating agreement or not. If you decide to buy it
25 anyway without getting the operating agreement, that's --

1 I'm sorry, but that's your problem.

2 THE COURT: Right. That's all right. I mean, I
3 was -- I was discussing the issue of those who were owners
4 of unsecured claims before the modified plan was confirmed.
5 I think it's a very different set of equities --

6 MR. KAMINETZSKY: Right.

7 THE COURT: -- afterwards.

8 MR. KAMINETZSKY: But the --

9 THE COURT: Although I'm not sympathetic to either
10 group --

11 MR. KAMINETZSKY: Okay.

12 THE COURT: -- on this point, so.

13 MR. KAMINETZSKY: Well, our plaintiffs are --
14 actually like bought -- bought into this.

15 I just wanted to say one -- I think you -- Your
16 Honor, you got it. I mean, the only way they get what they
17 want is if you turn this into something that it wasn't, but
18 -- and something that it was clearly and specifically and
19 deliberately not because we had an enterprise plan and it
20 was unconsummated, an enterprise value plan and then we had
21 this.

22 The other thing I wanted to say and I think it's
23 an important point is I -- I don't want to -- the PBGC and
24 the GM issue, I just -- I want to clarify something.

25 Available -- there's no obligation to use available cash to

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1 -- pursuant to Article 5 and give it out. The board could
2 do whatever it wants with available cash. It could use it
3 to buy another company. It could use it for whatever. Here
4 it shows to do the Article 12 redemption of the PBGC and --

5 THE COURT: I understand that, but --

6 MR. KAMINETZSKY: -- the GM.

7 THE COURT: -- on the other hand, it's not like
8 they're -- I mean, they're -- they're doing it to make the
9 payment to the investors, I mean, to the -- to the holders
10 of interests in this entity. It's not like they're doing it
11 to -- to buy a new plant. So it -- it just -- it -- this
12 argument seems a little -- a little too cute to me.

13 MR. KAMINETZSKY: Okay.

14 THE COURT: I mean, you could -- you could-- I
15 mean, you could say that, you know, if you get -- if you get
16 the consent you could make a distribution that's not pro
17 rata, but would be off like, you know, \$100 and then it
18 wouldn't be covered. I -- I just --

19 MR. KAMINETZSKY: Okay.

20 THE COURT: -- you know, it's --

21 MR. KAMINETZSKY: The good news is that's for
22 another day as plaintiff has -- have indicated.

23 THE COURT: Right.

24 MR. KAMINETZSKY: The other thing that I just
25 wanted to -- the part that I think just drives home the

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1 point, the partnership, it just -- it's factually
2 inaccurate. The partnership interest, the membership units,
3 were traded as Your Honor said. They were traded
4 frequently.

5 THE COURT: Right.

6 MR. KAMINETZSKY: Yes. The -- pursuant to the
7 exchange offer they became shares in a corporation rather
8 than -- but they were -- it just -- it --

9 THE COURT: Well, the only distinction is counsel
10 is saying that rather than selling what they already had,
11 i.e. limited partnership interests, what happens here is
12 they got something new. But it seems to me that the
13 something that they got that was new was simply a -- a
14 reformulation of their interest as --

15 MR. KAMINETZSKY: Right.

16 THE COURT: -- opposed to a --

17 MR. KAMINETZSKY: And that's precisely what the
18 IRS says; that all it is, it's an exchange. It's in form
19 and not -- read the cases. As opposed to a distribution
20 where you get something and you're taxed --

21 THE COURT: Right.

22 MR. KAMINETZSKY: -- this is just a swap of one --
23 and, Your Honor --

24 THE COURT: I mean, I -- and to be honest with you
25 that's -- that's why I disagree with one of the prongs of

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1 your argument, which is that now that it's DAP as opposed to
2 DAL, you know, DAP can --

3 MR. KAMINETZSKY: Do whatever it wants.

4 THE COURT: -- do whatever it wants --

5 MR. KAMINETZSKY: Okay.

6 THE COURT: -- because I -- I think --

7 MR. KAMINETZSKY: I hear Your Honor loud and clear
8 and so does the company.

9 The other point I wanted to make, if -- if they're
10 right, then just think about it. So it's not the money that
11 -- it just doesn't -- what we would have to do then, the
12 exercise to get to the 7.2 wouldn't be how much third
13 parties paid for the stocks. It would be the difference
14 between what we could have sold the membership units for for
15 what it's now worth because it's no longer membership units,
16 but it's stock in a company. We would have some -- to go
17 through some value -- because they're admitting that if it
18 was just member -- I mean, that just -- it's insane, quite
19 frankly. It doesn't --

20 THE COURT: I mean, that -- that seems right to
21 me. I mean, what --

22 MR. KAMINETZSKY: Because --

23 THE COURT: -- what -- what's happened here is
24 that the ownership interest has become more valuable than it
25 was, but it was value -- it was worth something before then.

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1 So it -- I don't see how you can actually put a value -- you
2 know, it seems like a very weird process.

3 MR. KAMINETZSKY: And -- and, Your Honor, just --

4 MR. JOHNSTON: It enabled the members to cash out.

5 THE COURT: Well --

6 MR. JOHNSTON: -- which they couldn't cash --

7 THE COURT: -- but they could have cashed out --

8 MR. JOHNSTON: -- out before.

9 THE COURT: -- before for less. They could have
10 cashed out -- I mean, I'm sure there was -- there were
11 people there --

12 MR. JOHNSTON: There --

13 THE COURT: -- at the time who were willing to buy
14 it for, I don't know, you know, \$4 billion --

15 MR. JOHNSTON: There -- there's no --

16 THE COURT: -- because --

17 MR. JOHNSTON: -- evidence of that.

18 THE COURT: But --

19 MR. JOHNSTON: And we're on the --

20 THE COURT: -- I mean, come on.

21 MR. JOHNSTON: -- complaint --

22 THE COURT: The partnership interests were worth
23 nothing and the -- and the stocks were worth everything? It
24 just doesn't -- it's not common sense. I mean, and I think
25 that really fails -- that just doesn't make sense, if that's

1 --

2 MR. KAMINETZSKY: And it's --

3 THE COURT: -- what you're saying.

4 MR. KAMINETZSKY: -- also factually inaccurate.

5 In fact, they were traded and then it's this hypothetical
6 exercise, and -- and that's just proof of what the IRS says
7 and what the case law says is true. One -- there's a --
8 distributions are distributions and exchanges are exchanges.
9 One's for real and taxable because you're getting stuff and
10 one is an exchange of equity interests and it's not taxable
11 and -- because you're not getting stuff.

12 And the proof in the pudding is how I started is
13 that on day one DAL had \$100. On day five DAL still had
14 \$100. Not a penny of that went -- was -- I say went -- was
15 distributed to any of the members as required under the
16 terms of the plan to qualify for the 7.2.

17 And that's all I have, Your Honor, unless there's
18 anything else.

19 THE COURT: Okay. Okay. Just briefly.

20 MR. JOHNSTON: For the record, Your Honor, there's
21 -- there's nothing in the record and Mr. Kaminetzsky doesn't
22 know and I don't know when my clients acquired their claims.
23 So --

24 THE COURT: All right. That's --

25 MR. JOHNSTON: So --

1 THE COURT: -- fair.

2 MR. JOHNSTON: So to -- to say that they bought
3 into this risk and --

4 THE COURT: Right.

5 MR. JOHNSTON: -- and they bought into --

6 THE COURT: Well, certainly, anyone who did buy
7 after confirmation, I suppose, or at least after the IPO
8 would know about the issue. But as I said I don't -- I
9 don't think for purposes of my analysis there's really a
10 meaningful distinction.

11 MR. JOHNSTON: Understood. I --

12 THE COURT: It's obviously worse.

13 MR. JOHNSTON: -- I wanted to make that clear.

14 THE COURT: Right. No. That's fine.

15 MR. JOHNSTON: And -- and --

16 THE COURT: That's fine. And that's not -- that's
17 obviously not a fact that's in the complaint. You don't
18 state when -- your clients don't state when they bought it -
19 -

20 MR. JOHNSTON: Right.

21 THE COURT: -- so it's not -- it's not relevant to
22 my analysis.

23 MR. JOHNSTON: And I -- I understand it's not a
24 meaningful distinction in your mind as to --

25 THE COURT: Right.

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1 MR. JOHNSTON: -- what was and was not disclosed
2 at the time of confirmation with respect to the operating
3 agreement. Our position is, in fact, it's -- it's pretty
4 darn important and it wasn't out there --

5 THE COURT: Okay.

6 MR. JOHNSTON: -- in an unsealed way.

7 THE COURT: But, I guess, if that's the case I
8 would have expected someone -- if it was that -- if it was
9 that important to have -- to have objected and said, this
10 isn't an adequate disclosure.

11 MR. JOHNSTON: It -- it's hard to get into the
12 mind of -- of parties in interest back then. I mean,
13 certainly --

14 THE COURT: Well, but, I mean, I --

15 MR. JOHNSTON: -- this happened very rapidly --

16 THE COURT: They certainly got --

17 MR. JOHNSTON: -- as I understand it.

18 THE COURT: -- disclosure of the public documents
19 which refer to the operating agreement.

20 MR. JOHNSTON: Yes. They -- they got disclosure
21 of the plan, the disclosure statement which repeats what's
22 in the plan.

23 THE COURT: Right.

24 MR. JOHNSTON: And the MDA which repeats what's in
25 the plan.

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1 THE COURT: But, I guess, I mean, in some sense it
2 seems to me to be kind of a red herring also, because the
3 operative word is "distribution" and if you -- if you leave
4 aside, as largely I have done, the argument that you have to
5 fit into Article 5 --

6 MR. JOHNSTON: Right.

7 THE COURT: -- and that, you know, there could be
8 certain types of distributions, but they're not Article 5
9 distributions so, therefore, you're not covered. If you
10 leave that -- if you leave that out, I -- I just can't see
11 that this -- the issuance of the stock is a distribution. I
12 just don't -- I mean, I don't --

13 MR. JOHNSTON: Well, at the end of the day --

14 THE COURT: I don't -- I don't see how it could be
15 a distribution.

16 MR. JOHNSTON: At the end of the day it enabled
17 the members of DAL to, when you combine it with PBGC and GM,
18 to put in ten plus billion dollars into their pocket. I
19 think if -- if you rolled back in time to when this
20 provision was being drafted, was being added to the plan and
21 you asked the unsecured creditors' committee if the members
22 of the company buyer were going to put \$10 billion into
23 their pocket would unsecured creditors be entitled to their
24 three-hundred-million-dollar distribution the answer would
25 have been yes. And I think --

1 THE COURT: Yes.

2 MR. JOHNSTON: -- discovery will show that.

3 THE COURT: I mean, you weren't there and I was,
4 but I'm not -- I'm trying to keep that out of my mind.

5 MR. JOHNSTON: Uh-huh.

6 THE COURT: But that wasn't the deal.

7 MR. JOHNSTON: Okay. Thank you.

8 THE COURT: If it was they would have gotten
9 warrants or CVRs. But I'm leaving that out of my mind.

10 All right. I have before me in this adversary
11 proceeding a motion by the defendants, Delphi Automotive
12 PLC, DIP Holdco III, LLC and DIP Holdco, LLP, d/b/a Delphi
13 Automotive, LLP to dismiss the adversary proceeding under
14 Bankruptcy Rule 7012. That Rule incorporates Federal Rule
15 of Civil Procedure 12(b) (6), which is the Rule that the
16 movants here are relying upon.

17 Under that Rule the Court, in considering whether
18 the complaint sets forth a claim, may consider facts stated
19 on the face of the complaint and the documents appended to
20 the complaint or incorporated in the complaint by reference
21 as well as matters of which judicial notice may be taken and
22 documents that are not specifically incorporated by
23 reference but upon which the complaint heavily relies. See,
24 e.g., DiFalco v. MSNBC Cable, LLC, 622 F.3d. 104-11 (2d Cir.
25 2011).

1 The Court must accept the complaint's factual
2 allegations as true and draw reasonable inferences in the
3 plaintiffs' favor. But the Court is not bound to accept as
4 true legal conclusions couched as factual allegations or
5 allegations that are clearly contradicted by documents
6 incorporated into the pleadings by reference or upon which
7 the complaint relies. In addition, where such issues are
8 relevant, i.e. where the Court is not relying upon the plain
9 meaning of documents, for example, or obviously, clear
10 issues of law, the complaint must also state a claim for
11 relief that's plausible on its face -- which does not
12 establish a probability requirement, but, rather, in the
13 light of the Court's experience and common sense would show,
14 in the particular context, the plaintiff has not asserted a
15 claim that is even plausible. See, generally, *Bell Atlantic*
16 Corp. v. Twombly, 550 U.S. 544-555 (2007) and *Ashcroft v*
17 *Iqbal*, 129 S.Ct. 1937-49 (2009).

18 Here, the complaint, in essence, although it also
19 asserts breach of contract claims and related claims, seeks
20 to enforce under 11 U.S.C. Section 1142 the modified chapter
21 11 Plan in this chapter 11 case and, more specifically,
22 provisions of that plan that provide a contingent right of
23 the unsecured creditor class, or the general unsecured
24 creditor class, to what is referred to as the "General
25 Unsecured MDA Distribution."

1 The plan sets forth a mechanism pursuant to which
2 unsecured creditors would receive their pro rata share of
3 the General MDA Distribution and defines that term; that is,
4 General Unsecured MDA Distribution, in -- in Paragraph
5 1.102. The term means:

6 "If and to the extent Company Buyer makes
7 distributions to its members in accordance with the Company
8 Buyer Operating Agreement, as described in Section 3.23 of
9 the Master Disposition Agreement, in excess of \$7.2 billion,
10 an amount equal to \$32.50 for every \$67.50 so distributed in
11 excess of 7.2 billion; provided, however, that in no event
12 shall the General Unsecured MDA Distribution exceed \$300
13 million in the aggregate."

14 The Company Buyer is defined in Paragraph 1.36 of
15 the modified plan as "DIP Holdco, III, LLC on behalf of
16 itself and other buyers as set forth in the Master
17 Disposition Agreement, as assignees of the rights of the DIP
18 agent to the Company Acquired Assets in connection with the
19 Credit Bid."

20 It's acknowledged that DIP Holdco, III, LLC, which
21 is one of the defendants here, was succeeded by Delphi
22 Automotive -- I'm sorry -- well, DIP Holdco, LLP d/b/a
23 Delphi Automotive, LLP, or DAL.

24 Section 3.2.3 of the Master Disposition Agreement
25 states:

1 "To the extent payable following the closing, the
2 Company Buyer shall pay to a disbursement agent such amounts
3 payable to the unsecured creditors of Delphi and the filing
4 affiliates pursuant to the plan of reorganization as filed
5 on the date of execution of this agreement without
6 modification as to the consideration to be paid under this
7 Section 3.2.3 unless consented to by Company Buyer in the
8 form of Company Buyer Operating Agreement included as an
9 exhibit to the Securities' Purchase Agreement as in effect
10 as of the date hereof, regardless of whether such agreement
11 is subsequently amended for distribution to such unsecured
12 creditors of Delphi and their filing affiliates subject to
13 the terms, conditions and limits as set forth in the plan of
14 reorganization and such Operating Agreement, which payment
15 to such disbursement agent shall be made only if the
16 transactions contemplated hereby are consummated pursuant to
17 a plan of reorganization and which payment shall not exceed
18 \$300 million in the aggregate."

19 The Company Operating Agreement, as referred to in
20 Section 3.2.3 of the MDA and, therefore, as referred to in
21 Paragraph 1.102 of the modified plan, it is agreed, was, in
22 fact, executed and is attached as an exhibit to the
23 Kaminetzsky declaration submitted in support of the present
24 motion.

25 The complaint contends that, in essence, the 7.2

1 billion-dollar threshold for the commencement of -- or the
2 fixing of the general unsecureds' rights under the plan to
3 their distribution has occurred. The complaint contends
4 that it occurred based upon two transactions in the
5 aggregate (although there's another ninety-five-million-
6 dollar tax distribution that is also included in the
7 complaint, but standing on its own would obviously not
8 trigger the 7.2 billion-dollar-threshold).

9 The complaint asserts that under the Operating
10 Agreement the DAL limited partnership redeemed approximately
11 \$4.7 billion from holders of interests in DAL, namely GM and
12 the PBGC. In addition, the complaint asserts that pursuant
13 to an integrated IPO transaction the ownership interests in
14 DAL were exchanged for stock in the third defendant in this
15 adversary proceeding, which is Delphi Automotive, PLC, or
16 DAP, that stock was issued to the public or -- DAP's stock -
17 - other stock -- was issued to the public, which created a,
18 or established a market value for such stock of in excess of
19 \$7.2 billion, in fact, over \$10 billion.

20 The complaint alleges that those two sets of
21 transactions, the redemptions with respect to GM and PBGC
22 and the going-public transaction, including the exchange of
23 partnership interests for stock, were "distributions" that
24 would fall within the definition of paragraph 1.102 of the
25 plan by the Company buyer, DAL, to its members in accordance

1 with the Operating Agreement, and that, therefore, as of
2 today it is clear that \$300 million should be set aside by
3 either DAL or DAP for distribution to the unsecured
4 creditors under the plan.

5 The defendants contend as the basis for their
6 motion to dismiss a number of things. I conclude that the
7 most important thing that they contend, and the dispositive
8 thing that they contend, requires the grant of their motion.

9 They assert that the exchange of limited
10 partnership interests in DAL for public stock in DAP is not
11 a distribution under the Operating Agreement or as a matter
12 of law. They contend in this respect, among other things,
13 that distributions under the Operating Agreement for
14 purposes of the 7.2 billion-dollar-threshold and the right
15 of unsecured creditors to recover under the plan are
16 governed by Paragraph 5.6 of the Operating Agreement, which
17 states that:

18 "In accordance with Section 3.2.3 of the MDA if
19 the asset purchase is consummated pursuant to the plan of
20 reorganization, once an aggregate of \$7.2 billion has been
21 paid as Distributions to the holders pursuant to this
22 agreement, the Company shall pay an amount equal to \$32.50
23 to a disbursement agent on behalf of the unsecured creditors
24 of Old Delphi for every \$67.50 in excess of such \$7.2
25 billion that is distributed to the holders pursuant to

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1 Section 5.1(a)(iv) up to a maximum amount of \$300 million."

2 They point out that the word "Distributions,"

3 which is used in that section, is defined on Page 4 of the

4 Operating Agreement as:

5 "Each distribution after the effective date made

6 by the Company to a member whether in cash, property or

7 securities of the Company pursuant to or in respect of

8 Article 5 or Article 10."

9 They contend that the exchange of partnership

10 interests in DAL for stock in DAP [see paragraphs 14, 47,

11 53, and 54 of the Complaint] does not fall within this

12 distribution definition, or use of the term "distribution"

13 in Section 5.6 of the Operating Agreement, but, rather, was

14 specifically contemplated in a different section of the

15 operating agreement, Section 14.13(b), which does, in fact,

16 provide for the conversion of DAL into a corporation and the

17 contribution of the respective membership interests to that

18 corporation in return for the stock of that corporation,

19 again, all for the purpose of implementing an initial public

20 offering.

21 The provision that I'm referring to, Section 14.13

22 states that the common equity securities of the issuer, i.e.

23 DAP, would be provided in exchange to the members reflecting

24 the residual interests of the members pursuant to Section

25 5.1(a)(iv) of the Operating Agreement, as shall be diluted

1 in ways that are irrelevant to the present dispute.

2 The movants contend, therefore, that such an
3 exchange as specifically contemplated under Section 14.13
4 does not fall within Article 5 of the Operating Agreement or
5 more specifically, Section 5.6, in that it is not a
6 distribution of the assets of DAL, but rather an exchange of
7 the ownership interests in DAL [for ownership interest in
8 DAP by the limited partners of DAL].

9 While it is clear from the operative documents
10 that the term "distributions" can include assets other than
11 cash, I believe it's plain from the terms of the agreement
12 that those assets need to be assets of DAL rather than
13 interests in DAL. It appears clear to me, therefore, that
14 based on the plain language of the Operating Agreement,
15 which does, I believe, clearly govern the general unsecured
16 creditors' right to their contingent distribution, the
17 exchange of limited partnership ownership interests in DAL
18 for stock in DAP merely changes the ownership interests that
19 the holders had, as opposed to resulting in a distribution
20 to them for purposes of the plan.

21 It is certainly true that the exchange and related
22 IPO enabled the owners of DAL to more successfully and
23 efficiently monetize their interests. Their receipt of the
24 DAP stock was a step in the going-public transaction, and
25 that transaction created a more efficient and widespread

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1 market for those interests. But, ultimately, it was the same
2 enterprise that they owned. It is clear to me from reading
3 the relevant provision of the plan as well as the Operating
4 Agreement that what the plan contemplated was a distribution
5 not in respect of the ownership of those who had shares or
6 limited partnership interests in the Company Buyer, but of
7 the Company Buyer's assets itself.

8 It is clear to me that if, in fact, the plan
9 contemplated the former, i.e. the right to up to 300 million
10 being triggered by the value of the owners of the Company
11 Buyer's interests exceeding \$7.2 billion, it would not have
12 been drafted in the way it has been drafted, but what --
13 rather it would have been tied to the value of the
14 interests, either directly through a valuation mechanism or,
15 more likely, through the distribution of rights that would
16 ride along with or could be monetized at the same time that
17 the owners monetized their interests, i.e. either in the
18 form of warrants or contingent value rights or the like.

19 I do not believe, therefore, that the issuance of
20 DAP stock and the exchange of that stock for the ownership
21 interests [of the limited partners] in DAL constitutes a
22 "distribution" under the plain language of Paragraph 1.102
23 of the modified plan. This is really separate and apart
24 from whether "distributions" under that paragraph should be
25 read as "Distributions" under the Operating Agreement, or

1 not, but simply in terms of the operative language as a
2 description of a distribution by the Company Buyer.

3 Let me be clear on this point. I do not believe
4 that the Company Buyer made a distribution by simply
5 facilitating the exchange of ownership interests between DAP
6 and the limited partners. So I am not relying on the fact
7 that what the limited partners received came not from DAL,
8 but rather from DAP.

9 It's conceivable to me, for example, that if DAL
10 transferred material assets to another entity and then that
11 entity transferred those assets to the holders of limited
12 partnership interests, such a distribution, even though it
13 might not be a "Distribution," would probably violate and/or
14 trigger, if it exceeded the 7.2 billion-dollar-threshold,
15 Paragraph 1.102 of the modified plan. But that's not what
16 happened here. The owners of DAL did not receive DAL's
17 assets.

18 This may seem and probably does seem to the
19 general unsecured creditors to be unfair. However, it was
20 the bargain that was struck by the terms of the plain
21 language of the plan. And I cannot undo the plan. I can
22 only enforce it under Section 1142 of the Bankruptcy Code.

23 There's no allegation here of any fraud in
24 connection with the obtaining of confirmation of the plan,
25 the plan has been fully consummated and the statutory period

1 has long expired to challenge it and undo it.

2 In that regard, whether the Operating Agreement
3 was "a secret agreement" or not, I believe, is irrelevant
4 since there's no allegation of any fraud in connection with
5 this transaction being put before this Court, in connection
6 with confirmation of the modified plan.

7 Moreover, the supplemental disclosure made by the
8 debtors in connection with the plan modification motion and
9 the terms of the modified plan itself lead one quickly and
10 inescapably to the Company Operating Agreement. I can take
11 judicial notice of the fact that there was -- there was no
12 motion made by any party who was not entitled to see the
13 Company Operating Agreement to obtain permission to see such
14 agreement.

15 I believe it's a matter of common sense that the
16 fiduciaries representing the unsecured creditors, most
17 importantly the unsecured creditors' committee did, in fact,
18 see the agreement and knew what it said. But even if they
19 didn't, they had the right to. And everyone in the case had
20 the right to ask to see it.

21 So there's, I believe, no basis for contending
22 that it should not inform the Court's interpretation of the
23 right accorded to the general unsecured creditors under the
24 plan to this contingent distribution.

25 Given that it is necessary from the face of the

1 complaint to treat the IPO stock issuance [and exchange] as
2 a "distribution" for purposes of the plan before the 7.2
3 billion-dollar-threshold is met, I believe that it would be
4 improper to consider whether the other transactions
5 described in the complaint, namely the GM and PBGC
6 transactions, would contribute to reaching the 7.2 billion-
7 dollar-threshold.

8 The parties have made their arguments both ways on
9 that point, but I believe both of them acknowledge that
10 given the shortfall of approximately \$2.4 billion, it would
11 be improper to consider that issue in a vacuum, i.e. whether
12 Section 5.6 of the Operating Agreement as well as Section
13 12.2 preclude treating the very significant payments made by
14 DAL to GM and PBGC as distributions for purposes of Section
15 1.102 of the plan.

16 So I will not go further on that point, but I do
17 not believe that, at this point, even if I ruled in favor of
18 the plaintiffs on this argument, the matter would be ripe
19 for any of the relief requested in the complaint, including
20 the request for declaratory judgment, since (a) there would
21 not be a breach yet because the 7.2 billion-dollar threshold
22 had not been reached, and (b) the gap before the 7.2
23 billion-dollar threshold would be reached is so significant
24 that it would not be proper to grant declarative relief and
25 subject the parties to the costs of litigation and appeals

1 when it's far from clear to me that there's any imminence of
2 the 7.2 billion-dollar threshold being met. See Olin Corp
3 v. Consolidated Aluminum Corp, 5 F.3d. 10, 17, (2d Cir.
4 1993).

5 On the other hand, as I think I've made clear
6 during oral argument, if, in fact, either DAL or DAP make a
7 -- make distributions out of their assets to the owners
8 which, when coupled with the payments that have already been
9 made to GM and PBGC come close to or go over the 7.2
10 billion-dollar threshold, I believe that there would, in
11 fact, be a basis for seeking declaratory relief, although
12 I'm not going to rule today how I would determine such a
13 request.

14 So for those reasons I'll -- I'll grant the motion
15 to dismiss. The request was made to dismiss with prejudice.
16 I will dismiss with prejudice as to the IPO transaction, but
17 not as to the other claims, since, as I've said, I'm -- I'm
18 really not ruling on the other claim distributions. And
19 that goes for all of the counts in the complaint.

20 And as I stated before, my ruling with respect to
21 this matter is based upon the plain language of the plan,
22 first and foremost, as well as the Operating Agreement and,
23 accordingly, my belief that there's no breach and to the
24 extent it exists, and it's questionable given 1142 of the
25 Bankruptcy Code, any duty of good faith and fair dealing,

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1 since that good faith and fair dealing duty is overridden
2 here by the clear language of the agreement which was set
3 forth in the plan.

4 So the defendants can submit that order. You
5 don't need to settle it on Dewey LeBoeuf, but you should run
6 it by counsel beforehand just so that he's comfortable it's
7 consistent with my ruling and then you can email it to
8 chambers.

9 MR. KAMINETZSKY: Thank you.

10 THE COURT: I -- there was a request for leave to
11 modify or sort of a request in the opposition to the motion.
12 My -- my practice generally is unless I believe there's --
13 there's no basis to -- to improve on a cause of action --
14 and here I've -- I've said that with respect to the IPO
15 cause of action, to deal with those issues only if there
16 actually is a motion filed. So I'm -- I'm not really
17 dealing with that issue at this point.

18 And, again, as I think I made clear, if actual
19 distributions by DAL or DAP get up towards the \$7.2 billion
20 when you factor in the GM and PBGC distributions, I can
21 certainly conceive of a situation where a new complaint
22 could be filed, which is why I'm not dismissing the
23 complaint as a whole with prejudice, but only in respect to
24 that component of it that deals with the IPO.

25 Okay. Thank you.

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1 MR. CAMPANARIO: Thank you, Your Honor.

2 THE COURT: All right.

3 (Whereupon these proceedings were concluded at 1:41

4 p.m.)

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3 I, Sherri L. Breach, CERT*D-397, certified that the
4 foregoing transcript is a true and accurate record of the
5 proceedings.

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7 **Sherri Breach**

Digital signed by Sherri Breach
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SHERRI L. BREACH

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10 **AAERT Certified Electronic Reporter & Transcriber**

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